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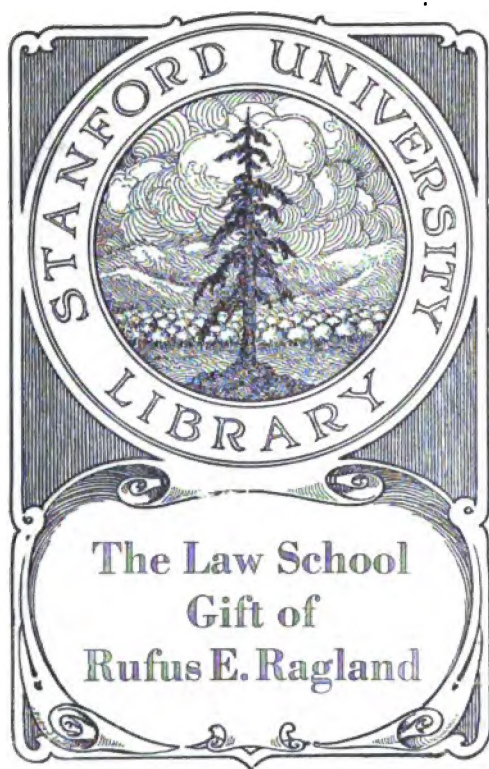
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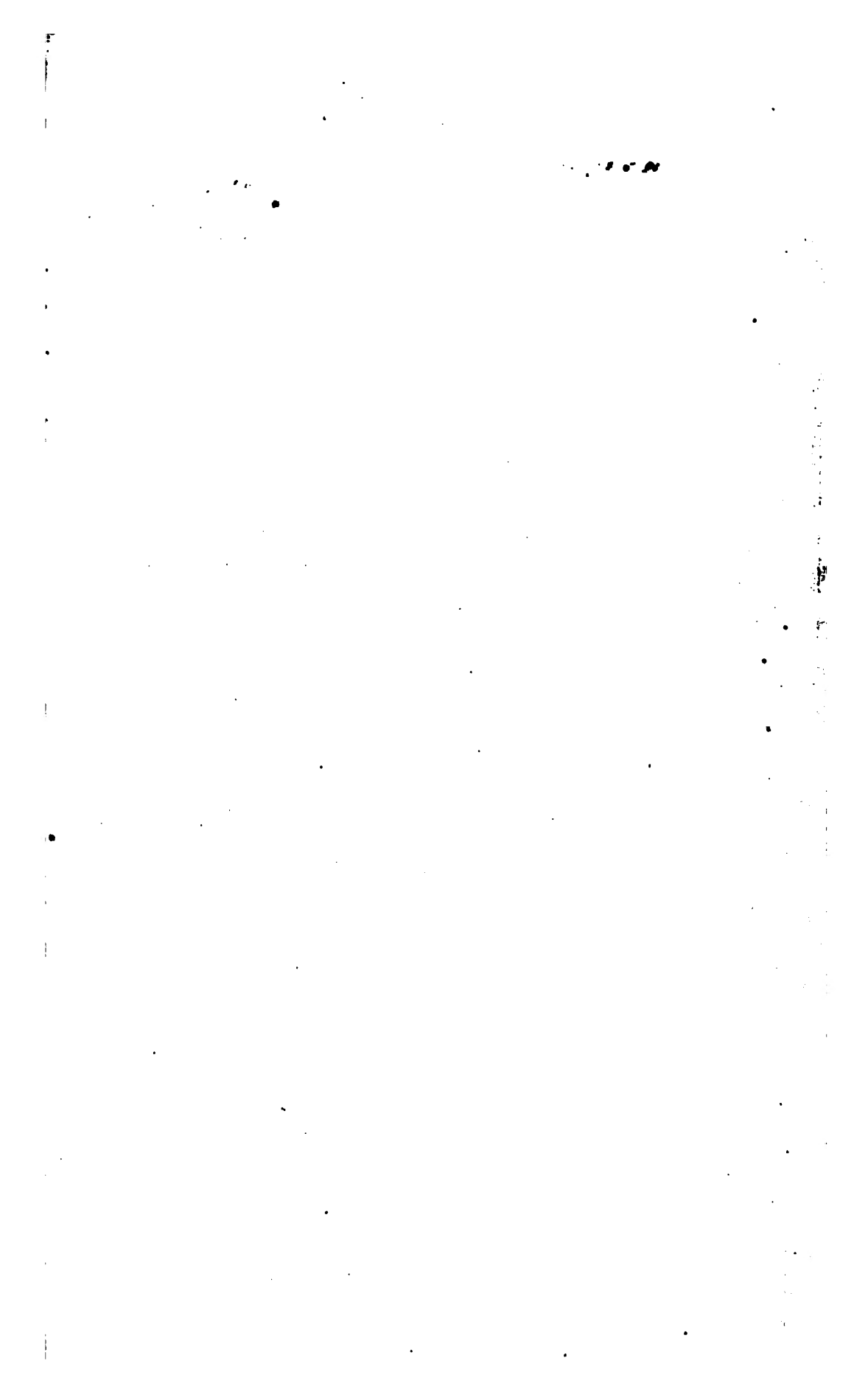
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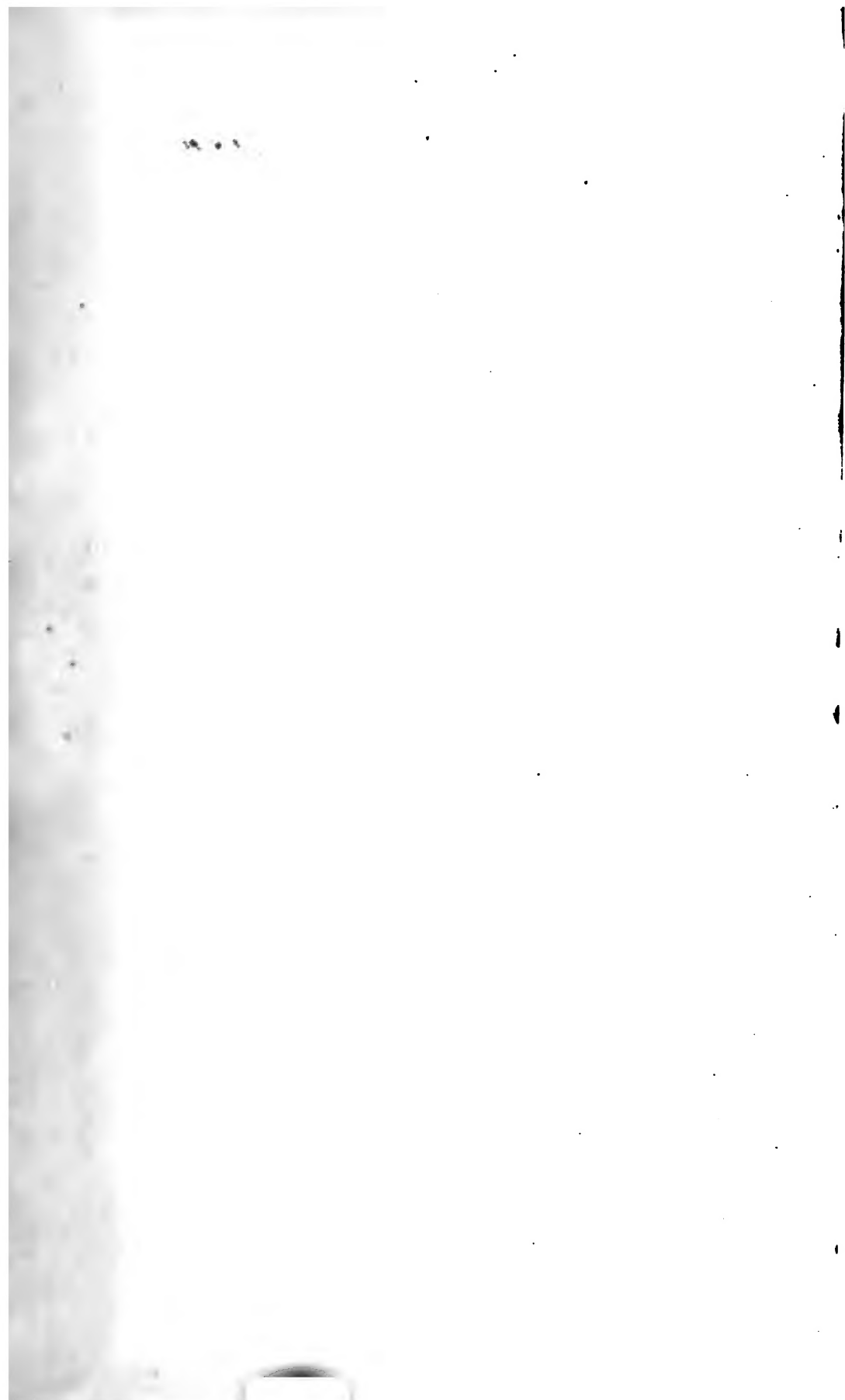




James P. Treadwell

James D. Thompson







REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN THE  
ENGLISH COURTS  
OF  
CHANCERY.

~~~~~  
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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY.

DURING THE TIME OF

LORD CHANCELLOR BROUGHAM

AND

SIR JOHN LEACH,

MASTER OF THE ROLLS.

~~~~~  
BY JAMES WM. MYLNE AND BENJAMIN KEEN, ESQS.

BARRISTERS AT LAW.  
~~~~~

VOL. III.

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SIR JOHN LEACH, - - - - }  
SIR CHARLES CHRISTOPHER PEPPY, } - *Masters of the Rolls.*

SIR LANCELOT SHADWELL, - - - - *Vice-Chancellor.*

SIR WILLIAM HORNE, }  
SIR JOHN CAMPBELL, } - - - - *Attorneys-General.*

SIR JOHN CAMPBELL, - - - - }  
SIR CHARLES CHRISTOPHER PEPPY, } - *Solicitors-General.*  
ROBERT MONSEY ROLFE, ESQ., - }



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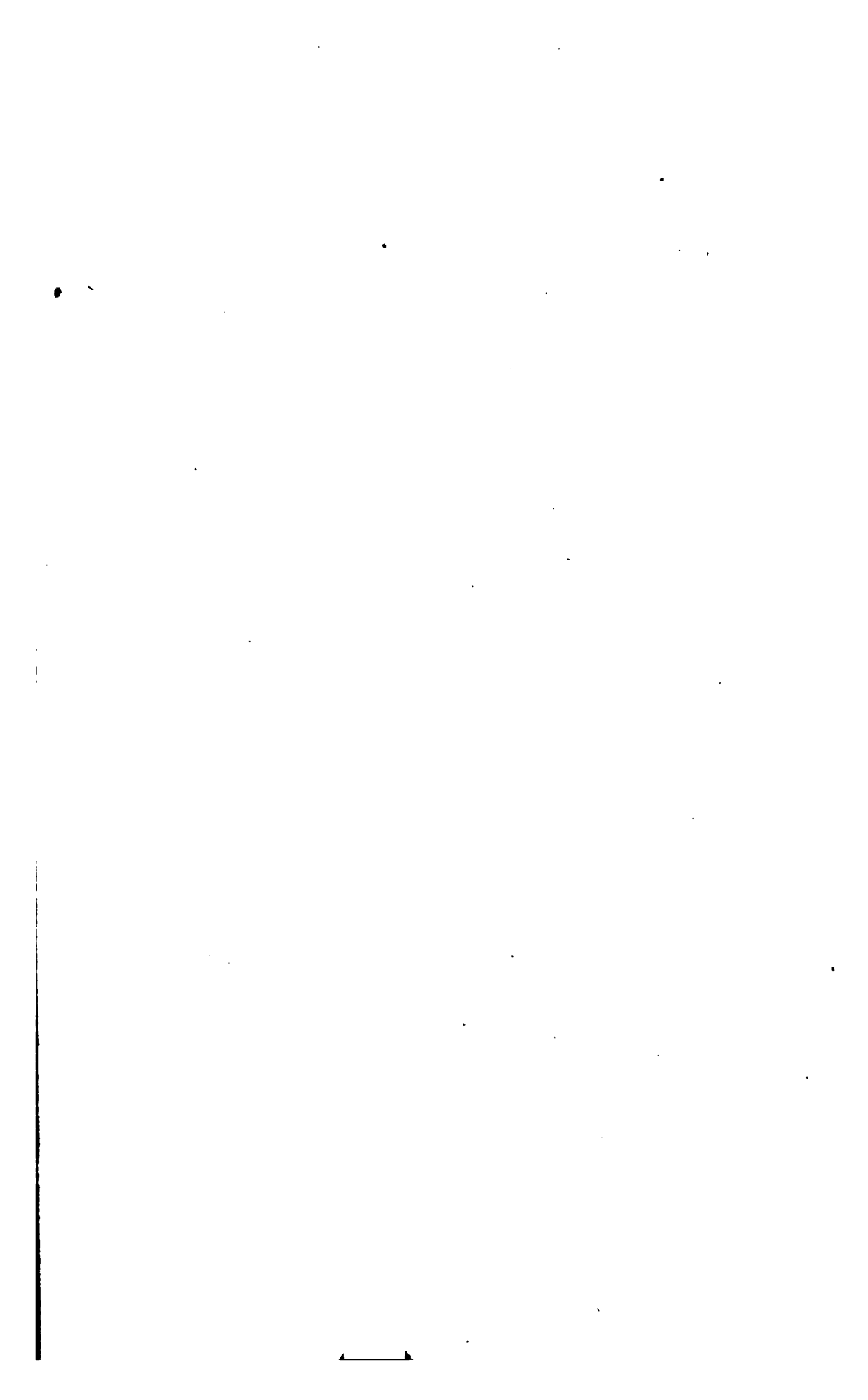
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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF CHANCERY.

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LOVEGROVE *v.* NELSON AND COX.

ROLLS.—1834: 23d January. L. C.—17th June and 7th August.

By the terms of the articles of agreement, usually entered into between the Postmaster-General and the persons supplying horses for the mail coaches, the Postmaster-General cannot exercise the power of nominating a new party to perform neglected duty, for which provision is made in the articles, without notice to all the parties to the agreement, who have the option of performing the neglected duty themselves.

A bill for an account by a substituted party, of whose nomination the Postmaster-General had given no notice to one of the defendants, an original contracting party, who was entitled to the option of performing the neglected duty himself, was, therefore, dismissed at the original hearing; but the decision was reversed upon appeal, upon the ground that, although no notice had been given by the Postmaster-General, the defendant knew of the nomination of the plaintiff, and that his conduct was equivalent to a waiver of the option.

By articles of agreement made the 5th day of July, 1828, between the defendant, Robert Nelson, coach proprietor, and the several other persons whose names were subscribed, and seals affixed thereunto, of the one part, and William, Duke of Manchester, his Majesty's Postmaster-General, of the other part—Robert Nelson, and the several other persons, subscribers there, to, did, for the considerations therein mentioned, severally and respectively, and for their several and respective heirs, executors and administrators, covenant, contract, \*and [\*2] agree with the said William, Duke of Manchester, and with the Postmaster-General, for the time being, and with each other, and with the executors and administrators of each other, that Robert Nelson, and the several other persons subscribers thereto, should and would, from the date thereof, daily in every week, convey from the general post-office, London, to the post-office at Stroud, and back, with the addition of twelve miles to

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1834.—Lovegrove v. Nelson.

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and from Chalford and Wotton-under-Edge at the same mileage, viz., twopence halfpenny, his Majesty's mail of letters by the patent coaches then in use, and by such other carriages as the Postmaster-General should approve or direct to be made and built by such persons as he should approve; and that they, the said Robert Nelson, and the several other persons subscribers thereto, should and would pay, or cause to be paid, by quarterly payments, unto such person or persons as the Postmaster-General should direct or approve to build and furnish such coaches or carriages, one penny halfpenny per mile, for every mile both to and from the place and places before named; and that Robert Nelson, and the several other subscribers thereto, should conform to and perform the several directions and agreements therein particularly mentioned. And in case any of the subscribing parties should die, become bankrupt, or insolvent, or by any breach of contract or neglect of duty induce the Postmaster-General to require his or her dismissal (to do, which power was thereby given), that then the other parties, or one or more of them, should either work their, his, or her ground, or admit some other person, to be approved by the Postmaster-General, to perform the work of the party dismissed or removed. But, in case any of the parties should neglect to comply therewith, and the Postmaster-General should be obliged to convey the mails at the public expense, that then he should and might [\*3] retain, out of the payment thereafter agreed to be made, all such sums of money as he should so pay. And in consideration of the due performance of the premises by the said contracting parties, the said William, Duke of Manchester, did thereby covenant and agree to and with the said Robert Nelson, and the other subscribers thereto, that he, the said William, Duke of Manchester, or the Postmaster-General for the time being, should and would, out of the revenue of the post-office, pay unto one of the said contracting parties, for the use of himself and the several other parties, by quarterly payments, twopence halfpenny per mile for every mile, both to and from which the said mails should be conveyed each journey; and it was further agreed that the contract should remain in force until the 5th of July, 1829, and from thence until three months' notice of quitting should be given in writing by either party to the other parties.

This agreement was executed by the defendants, Nelson and Cox, the words "to Benson," and "to Chalford," being added to their respective signatures; it having been agreed between these parties, that Nelson was to horse the mail from London to Benson, and Cox from Benson to Chalford.

The defendants continued to supply horses for the mail coach, for their respective destinations, according to the articles of agree-



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1834.—*Lovegrove v. Nelson.*

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ment, until the month of June, 1831, when Nelson, finding the portion of road between Maidenhead and Benson unprofitable, declined to supply horses farther than from London to Maidenhead, and gave notice to the Postmaster-General for the time being, of his intention to determine the agreement as to that portion of the road.

The Postmaster-General thereupon entered into an agreement with the plaintiff, Richard Lovegrove, dated the \*8th [\*4] day of June, 1831; whereby, after reciting the articles of agreement of the 5th of July, 1828, and that Robert Nelson had ceased to perform the work upon that part of the ground between Maidenhead and Benson, being a distance of twenty-one miles, and that the Postmaster-General had, pursuant to the power given by the said recited articles, approved of Richard Lovegrove as a proper person to perform such part of the duty; and that the said Richard Lovegrove had thereupon consented to enter into this present contract with the Postmaster-General, it was witnessed that the said Richard Lovegrove, in consideration of the premises, did, for himself, his heirs, executors and administrators, covenant and agree with the then Postmaster-General, and with the Postmaster-General for the time being, so long as the said recited contract should continue in force, that he, the said Richard Lovegrove, should and would, well and truly observe, perform, accomplish, fulfil and keep all and every the clauses, provisos, articles, matters and things contained in the said recited articles, which, on the part of the said Robert Nelson, his heirs, executors, or administrators, so far as respected the portion of ground between Maidenhead and Benson, were, or ought to be observed, performed, fulfilled and kept, according to the true intent and meaning of the said articles, as fully and effectually in every respect, as if the said Richard Lovegrove had been a party to, and executed the said recited articles; and in consideration of the premises, the then Postmaster-General did thereby covenant and agree with the said Richard Lovegrove, that he, or the Postmaster-General for the time being, should and would observe, perform, accomplish, fulfil and keep all and every the clauses, provisos, articles, matters and things contained in the said recited articles.

The plaintiff, in pursuance of this agreement, horsed the mail for the portion of road between Maidenhead and Benson from \*the date of the agreement until the 4th of April; [\*5] 1832, when the contract between the Postmaster-General and the defendants was terminated. Nelson received from the Postmaster-General the allowance for the conveyance of the mail from London to Stroud, and he kept the accounts of the receipts and disbursements, and the plaintiff received his proportion of the profits of the concern, calculated according to the number of

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1834.—Lovegrove v. Nelson.

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miles performed by him, from the date of his contract with the Postmaster-General, to the 19th of November, 1831. Upon the balance and settlement of the accounts on the termination of the contract, it appeared that a sum of 175*l.* was due to the plaintiff for his share of the profits. The plaintiff being unable to obtain the payment of that sum from either of the defendants, the bill was filed against them for an account of the concern from the time of the plaintiff's agreement with the Postmaster-General, the plaintiff insisting that by such agreement he became a partner in the concern, with the same rights as if he had been originally a party to the articles of agreement of July, 1828.

The defendant Nelson admitted that by the contract of July, 1828, he had engaged to horse the mail from London to Benson; and he stated that the mode in which mail coach contractors conducted their business was, that different individuals engaged to horse the coach a certain number of miles, and that when the accounts of the earnings of the coach were from time to time made up, such earnings were divided among the parties according to the number of miles each contracting party had worked, and that such business was in no respect considered by the parties as a partnership business, nor had any partnership been entered into by the defendant Cox, and the plaintiff. The defendant admitted that he and Cox had received from the Postmaster-General the allowance for the mileage, and that he [\*6] had paid to the \*plaintiff his share of the earnings of the coach from the date of the plaintiffs' agreement with the Postmaster-General down to the 19th of November, 1831, and that the plaintiff was entitled to receive his share of the earnings from that time to the termination of the contract; but he submitted that no partnership between himself and Cox and the plaintiff, was constituted by the contracts of the 5th of July, 1828, and the 8th of June, 1831.

The defendant Cox, by his answer, stated that previously to entering into the contract with the Postmaster-General, he wrote a letter to Mr. Johnson, the inspector of the general post-office, through whose agency the contract was made, inquiring whether it was clearly understood that he, the defendant Cox, and Nelson, were not responsible for each other, but that he, Cox, was responsible only for the ground he had separately contracted to work; and that Mr. Johnson, in reply to such letter, had assured him that practically Nelson would be considered responsible only in respect of furnishing the horses to Benson, and he, the defendant Cox, for the remainder of the distance. The defendant further stated, that he was not privy to the articles of agreement between the plaintiff and the Postmaster-General; that when the defendant Nelson, as the fact was, transmitted to him in July, 1831, the monthly account ending the 30th of July, in which he

1834.—*Lovegrove v. Nelson.*

gave credit to the plaintiff for a share of the general profits of the concern in proportion to the distance from Maidenhead to Benson, he, the defendant Cox, refused to settle such account, insisting that the plaintiff was not a partner in the concern; that Nelson afterwards reformed the account, taking credit to himself for the whole distance between London and Benson, and that, if Nelson paid to the plaintiff a share of the profits according to the work performed by the plaintiff \*down to Novem- [\*7] ber, 1831, such payment must have been made as this defendant supposed, in consequence of an agreement between Nelson and the plaintiff, to which he, the defendant Cox, was neither party nor privy. And he, the defendant Cox, further stated that he had uniformly persisted in refusing to acknowledge the plaintiff as a partner, or to have any dealings with him, down to the time of the termination of the contract on the 4th of April, 1832, when Nelson again endeavored to connect him with the plaintiff by rendering a final account, which he, the defendant Cox, refused to adopt.

The question in the cause was, whether the plaintiff was or was not to be considered as a partner in the concern, and consequently entitled to the account prayed, as if he had been a party to the original agreement of July, 1828.

Mr. *Pemberton* and Mr. *Ching*, for the plaintiff, argued that by the terms of the contract between the Postmaster-General and the parties subscribing it, the nominee of the Postmaster-General, in case of the neglect of any one of the parties to perform the duty contracted for, became as much a partner in the concern, and was as fully entitled to an account against the subscribing parties, in the character of co-partner, as if he had been an original party to the instrument. There were several cases at law bearing upon this question.

In *Fromont v. Coupland*,<sup>(a)</sup> where the plaintiff and defendant had been engaged in running a coach from Bath to London, the plaintiff finding horses for one part of the road, and the defendant for another, and the profits of each party were calculated according to \*the number of miles covered by his [\*8] own horses, the plaintiff receiving the fares, and rendering a weekly account of them to the defendant, it was held that the plaintiff and defendant were partners in this concern, and that in an action by the plaintiff against the defendant upon a separate transaction, the defendant could not set off a balance in his favor, where no final adjustment had been made, upon these weekly accounts. *Barton v. Hanson*<sup>(b)</sup> was cited in that case to show that the parties were partners; but Chief Justice Best observed

(a) 2 Bing. 170.

(b) 2 Taunt. 49.

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 1834.—Lovegrove v. Nelson.
 

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that no authority was requisite to prove that the parties were partners, because both were engaged in carrying the same passengers; they divided the profits, and were answerable to the public jointly. The same reasons for constituting a partnership, applied to the case of the present plaintiff, with the exception of one of the particulars, mentioned by Chief Justice Best, namely, a just distribution of the profits, to which the plaintiff was clearly entitled, and which it was the object of this suit to obtain.

In *Radenhurst v. Bates*,<sup>(a)</sup> where several persons, jointly interested, agreed to horse a coach, each of them one stage on the road from Liverpool to Birmingham, and that, in case of default, one of them should sue the defaulter for a penalty, which should be divided among the non-defaulters, it was held, that an action might be brought upon the agreement against a defaulter by the party appointed to sue, and that the others need not join in the action. In that case, the foundation of the judgment, which was also pronounced by Chief Justice Best, was a recognition of the parties in the character of partners. In *Helsby v. Mears*,<sup>(b)</sup> it was held, that a special contract made by one of several joint coach proprietors for the carriage of parcels was binding [\*9] \*upon them all, though some of them became proprietors after the contract was made.

In the present case, the defendant Cox relied upon his having repudiated the introduction of Lovegrove as a partner; but Nelson having neglected to perform a portion of his duty, Cox was bound by that part of the contract which enabled the Postmaster-General to nominate another person, and it was not competent to Cox to repudiate the partnership constituted by the nomination of the plaintiff.

As to Cox's statement that he was ignorant of the contract between the plaintiff and the Postmaster-General, he knew that Nelson had declined working the portion of road from Maidenhead to Benson, and that this part of the contract must be performed by some one, and his refusal to recognize the plaintiff as a partner in July, 1831, was conclusive as to his knowledge that the plaintiff was the person who had been introduced into the concern. In the evidence of Cox's own agent, Wakefield, it appeared that Wakefield met the plaintiff in the following November at the office of Mr. Johnson, the superintendent of mail coaches, and there heard the plaintiff state that Mr. Johnson had settled with him for the mileage, but that he further claimed his share of the partnership profits. There could be no doubt, therefore, that Cox was perfectly cognizant of the contract between the plaintiff and the Postmaster-General, though it was not directly communicated to him.

(a) 3 Bing. 463.

(b) 8 Dowl. & Ry. 289.

1824.—Lovegrove v. Nelson.

Mr. *Bickersteth* and Mr. *Loval*, for the defendant Nelson.

Mr. *Treslove* and Mr. *Wilbraham*, for the defendant Cox:—\*This is substantially the suit of Lovegrove and [\*10] Nelson against Cox; for there can be no doubt that when Nelson determined to decline working the portion of road between Maidenhead and Benson, he entered into a sub-contract with Lovegrove, which was never communicated to Cox. The correspondence between Cox and the superintendent of mail coaches, before any contract was entered into, shows the anxiety of Cox to limit his own responsibility to the portion of road which he had agreed to work; and he had every reason to suppose, from the answer of Mr. Johnson, that this was to be considered the basis of the agreement, as between Cox and the post-office. Supposing, however, that answer to be ambiguous, and the contract itself not to admit of a construction which would exonerate Cox from the consequences of Nelson's default, still, according to the language of that contract, the plaintiff could not be imposed as a partner upon Cox, without previous notice having been given to him that Nelson had neglected or abandoned his engagement in the articles of agreement as to the furnishing of horses for a particular part of the road. If such notice had been given, Cox would have had the opportunity to act upon the option given to him by the articles, to perform himself the duty neglected by Nelson. Cox refused to have any dealings with the plaintiff from the moment Nelson transmitted accounts in which the plaintiff's name appeared, and he uniformly persisted in his refusal to recognize the plaintiff as a partner. Unless, therefore, a partnership with the plaintiff can be forced upon the defendant without his consent, and against his expressed will, it is impossible that this bill can be sustained. In *Ex parte Barrow*, (a) Lord Eldon said, "A man may become a partner with B, where A. and B. are partners, and yet not be a member \*of the partnership which exists between A. and B." [\*11] Whatever relation, therefore, may subsist between Nelson and the plaintiff, by reason of the transactions between them, the plaintiff can claim no account against Cox, who expressly repudiated all dealings with him.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS:—This case raises a question of very considerable importance to the Postmaster-General with respect to the construction of the contracts into which he usually enters with persons employed in the conduct of mail coaches.

(a) 2 Rose, 252.

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1834.—Lovegrove v. Nelson.

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There are two questions to be considered; first, did this contract authorize the Postmaster-General to appoint a person who is to be considered as a partner in this concern, as if he had been originally a party to the contract; and has the Postmaster-General in this particular case appointed such a person in conformity with the terms expressed in the contract? Secondly, did those expressed terms require notice to be given by the Postmaster-General to every person who was originally a party to the contract before he made such appointment? Before he can name a new person as a partner, the persons who are actually partners have a right, by the terms of the contract, to prevent any new appointment, by undertaking to perform that part of the duty, in neglect or default of which authority is given to the Postmaster-General to appoint. It being, therefore, in the option of the existing partners to perform the duties themselves, before the Postmaster-General can appoint another person to perform it, I am of opinion that, according to the true construction of this contract, notice must be given by the Postmaster-General to every existing party to the contract before he can name [\*12] a new \*party. It is extremely important that the existing partners should have such notice, because it is necessary that they should have a proper confidence in the new partners who are introduced, and who are mutually to account with the rest for the receipts and disbursements in the general concern.

There is another consideration which renders such notice still more important. By the terms of the contract, the Postmaster-General has a right to pay to the person so introduced into the concern the whole sum due to all the partners. Every partner, therefore, has a most material interest in the introduction of such new partner, and I am clearly of opinion that no such new partner can be introduced without notice to every person interested in the concern.

But, although no such new partner can be introduced without notice, there may be in this, as in every other case, a waiver on the part of the persons who are legally entitled to take the objection, that no notice has been given; and the next consideration is, whether there has been a waiver on the part of the defendant Cox. No waiver in direct terms can be imputed to him. When he was informed that Lovegrove claimed to be a partner, he refused to have any dealings with him in that character, and persisted, to the termination of the contract, in his objection. It is said that Cox, when he made the objection, was aware that Lovegrove had been introduced by the authority of the Postmaster-General; and if I had found any evidence to show that Cox was aware of that fact, I should have thought it incumbent upon him immediately to inform the Postmaster-General that he was himself ready to undertake the work confided to Lovegrove. I

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do not find the fact that Mr. Cox was ever aware of the agreement between the \*Postmaster-General and Lovegrove. It is true that Wakefield, the agent of Cox, says in his evidence, that he met Mr. Lovegrove at the office of Mr. Johnson, the superintendent of mail coaches, and that he there learnt that Mr. Lovegrove had received from the Postmaster-General that portion of the mileage which was due in respect of the horsing from Maidenhead to Benson, but it is plain that Nelson had fully consented to Lovegrove receiving that portion of the mileage, and, therefore, if there had been no engagement whatever with the post-office, Wakefield would not have been surprised that Lovegrove had received that mileage, because, according to the whole conduct of Nelson and of Lovegrove, it was clear that Nelson would have permitted Lovegrove to receive it. It does not amount, therefore, to evidence of the fact that Cox was aware of the agreement entered into with the post-office. [\*13]

Upon these considerations, I am of opinion that the plaintiff does not stand in a relation which entitles him to an account against Cox and Nelson. I do not consider that the effect of my judgment in this case will be to deprive the plaintiff of all remedy. It appears to me that he is fully entitled to an account of this concern against Nelson, and it may be that he is entitled to make Cox a party in a new suit, in which his case is put entirely upon the assent of Nelson to his horsing the coach from Maidenhead to Benson; but, according to the present frame of this bill, I am bound to dismiss it with costs.

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*January 24th.*—On the following day, his Honor intimated that Nelson was not entitled to his costs.

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\*The plaintiff presented a petition of rehearing to the Lord Chancellor. [\*14]

*June 17th.*—Mr. Ching (in the absence of his leader,) for the appellant, stated that the defendant Nelson had admitted his own liability to the demand of the plaintiff, and that Cox was the only defendant who appeared upon this appeal. In support of the proposition that all the parties were to be considered as partners, he cited and commented upon the same cases which had been cited in the court below; and he further contended, that even if the principle of the decision were right, namely, that notice of Nelson's abandonment of the contract as to the portion of road between Maidenhead and Benson, ought to have been given by the Postmaster-General to the other contracting parties, so as to have afforded Cox the option of working it himself, there had been a waiver of such notice on the part of Cox, who

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knew of the duty having been undertaken by Lovegrove, shortly after the date of the agreement between him and the Postmaster General; and notice to one partner in a partnership transaction, was notice to the other. Cox evidently knew of the nomination of the plaintiff by the Postmaster-General; he had as manifestly by his conduct, acquiesced in that nomination; and it was against all justice to defeat the claim of the plaintiff to that share of the profits to which he was entitled under the agreement of July, 1831, upon the ground of Cox having been deprived of a right of option which he took no step whatever to claim or exercise, and which his whole conduct showed that he was content to waive.

Mr. Treslove, Mr. Wilbraham and Mr. Wood for the respondent, admitted that the cases cited would have some application, if there were any foundation for the \*allegation in the bill, that the plaintiff had engaged in the concern, with the knowledge and the concurrence of Cox; but Cox knew nothing of the contract between the Postmaster-General and Lovegrove, and had uniformly refused to acknowledge Lovegrove as a partner, or to have any dealings with him. Where A. disposed of a part of his interest in a partnership concern to B., an account might be taken between A. and B. in respect of the share of the profits to which B. was entitled, and B. was bound by all the equities between A. and the other partners; but the other members of the partnership could not be affected by the transaction between A. and B. *Ex parte Barrow, (a) Brown v. De Tasset. (b)* Thus in *Bray v. Fromont, (c)* where the three defendants worked a coach from London to Bath, each finding horses for certain stages, and the bill was filed, as in the present case, for an account, and proportionate share of the profits, Smith, one of the defendants, having employed the plaintiff to provide horses for a part of his distance, the same judge who decided the present case held, that the plaintiff claiming under Smith must be subject to the account between him and the other defendants, and could claim payment only out of the balance due to Smith; but that it would have been otherwise if the other co-defendants had accepted him in the concern in lieu of Smith. If, therefore, there was a sub-contract between Nelson and the plaintiff, in respect of horsing the mail from Maidenhead to Benson, the plaintiff was, no doubt, entitled to his share of the profits as against Nelson, though the Master of the Rolls considered his suit improperly framed, for the purpose of recovering such share; but it was impossible to contend that Cox, who was neither party nor privy to

(a) 2 Rose, 252.

(b) Jac. 284.

(c) 6 Mad. 5.



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the instrument under \*which the plaintiff claimed, and [\*16] who had repudiated all partnership or dealings with the plaintiff, could be affected by any collateral transactions between him and Nelson.

It was not denied that, by the terms of the original contract, Cox was entitled to notice of the default of Nelson before any other person could be nominated by the Postmaster-General; but it was said that Cox had waived the notice by not having claimed it, and by having subsequently acquiesced in the discharge of the duty by the plaintiff. But how could Cox exercise his right of option, when the only notice he received was the information that the plaintiff had been appointed—that the very event had taken place which the notice would have enabled him to prevent? The nomination of the plaintiff by the Postmaster-General, having been made without notice to Cox, was void as against him, and could receive no validity from any supposed constructive acquiescence of Cox, or from anything short of Cox's express confirmation. Such confirmation Cox had uniformly refused.

Mr. Ching, in reply.

*August 7th.*—THE LORD CHANCELLOR:—The question here was, whether a mail coach contract constituted a partnership among the contractors under the following circumstances:

In July, 1828, Nelson and Cox contracted with the Postmaster-General to horse the mails from London to Stroud in Gloucestershire and to Chalford, the contract being liable to be put an end to on three months' notice on either side.

\*In June, 1831, Nelson, who had contracted to supply [\*17] the horses from London to Benson, gave notice to the Postmaster-General of the abandonment of his contract, as to the part of the road between Maidenhead and Benson. On the 8th of June, 1831, Lovegrove agreed with the Postmaster-General to perform the contract between Maidenhead and Benson, which he accordingly did. In April, 1832, the contract between the Postmaster-General and the several parties was terminated. Cox avers, that he had throughout carefully guarded against being drawn into a partnership with his brother contractors, and very possibly he intended so to do, and thought he had done so; and he says further, that before he entered into the contract he obtained an assurance from the post-office that this should be avoided.

The profits arising from the contract with the Postmaster-General, were divided between the contracting parties according to their respective distances. Upon the determination of the contract, Lovegrove, not being able to obtain his share of the pro-

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fits, filed his bill for an account of all moneys paid under the alleged partnership. The Master of the Rolls dismissed the bill, and this is an appeal from his Honor's decree.

There are two questions involved in this case: First, is the Postmaster-General entitled by the contract to fill up vacancies among the partners, or generally to name persons who shall become partners with the others in all respects? Secondly, was the appointment made in this case conformably to the provisions of the contract; in other words, was previous notice requisite to all the remaining partners? If necessary, was it given? and if not given, has there been a waiver by those entitled to notice?

[\*18] \*These questions exhaust the whole case; but as I differ with his Honor in some material points, while I agree with him in others, I shall be obliged to go through the case minutely; and this becomes the more desirable, in consequence of the importance said to be attached to this case by those connected with the public service.

It must be observed, that this contract is very imperfectly and inartificially drawn; and that, if the court is obliged to impose a construction upon it which may prove inconvenient to the public, the fault lies not here, but elsewhere. The clause empowering the Postmaster-General to fill up vacancies does not expressly provide for the case which has happened—a vacancy by resignation. It only contemplates bankruptcy, insolvency, breach of contract and neglect of duty; and provides that in such cases the Postmaster-General may remove, and, in a certain way, fill up the vacancy. The omission of the case of resignation is owing to what no draughtsman ever ought to do; namely, making one clause serve two purposes. Whoever prepared this contract was minded to provide at once the power of removal, and the power to name a successor; and the clause, by which these purposes were to be effected, referred only to cases of breach of contract or inability to perform it. Yet I think, that if under the words "neglect of duty" we are not entitled to include a notice of not continuing to perform it, we may assume that the case of resignation is understood, though not expressed, and comes within the spirit, if not reached by the letter, of this clause. If so, the Postmaster-General has a power of naming the successor in a certain way, and in a given case. Let us next see what that is, and whether it arose here.

[\*19] \*The clause is, that in the case of death, bankruptcy, and the other cases mentioned, not the Postmaster-General shall appoint, but one or more of the other parties shall work the ground of the party removed, or admit the nominee of the Postmaster-General. Now, whatever may be the inconvenience resulting from the construction that must be put upon

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this clause, can there be the least doubt that it only gives the Postmaster-General the nomination of a successor in case the remaining partners decline to take the vacant place? The whole is as plainly an alternative as can be conceived. Nay, the primary object of the provision is the option given to the remaining partners; and it is only in the event of their refusing, that the Postmaster-General is even mentioned.

But if this be the plain intendment of the provision, there seems to be no doubt at all that notice must first be given in some way to the remaining partners; else how can it be said that the event has happened which alone gives the Postmaster-General a power to nominate—namely, none of the other parties working the ground of the one removed or declining? I therefore entirely agree that this notice was necessary. At the same time, I perceive plainly enough the extreme inconvenience of this construction; for as there may be twenty contractors on a line of road, it will follow that there can be no arrangement made to supply the place of any one until all the rest, down to Edinburgh or Inverness, for example, have had notice and declined. This may not have been intended at the general post-office, but we are here in a place where men's meaning can only be gathered from the language they use to convey it; and the language of this contract is quite plain and free from all doubt, or obscurity.

\*I will here dispose of a point, which was made in the [\*20] argument, and as I think, without either necessity or foundation; that no partner can be named for another—that no one can be put upon another as a partner without his consent. I say this was superfluous, both because the proposition is really self evident, and because no necessity for importing it into the case exists. Such an argument is wholly inapplicable to the present question. To make a person a partner with two others, their consent must clearly be had, but there is no particular mode or time required of giving that consent, and if three enter into partnership by a contract, which provides, that on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the court must perform, and that the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name. The present contract is of this description; and if the manner of executing the power of nomination be pursued by the Postmaster-General, the successor to the vacant place comes in, strictly speaking, by the previous consent of the whole body of contractors.

In the present case, however, it is said that the Postmaster-General gave no such notice as was required, nor did Nelson,

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the retiring partner; so that the other, Cox, had no option given him to take the portion of road abandoned by Nelson; and I think it cannot be doubted that this is true. There is no proof whatever of notice, and Cox wholly denies all partnership, even with Nelson, and all responsibility for him, though of the correctness of the last statement I am now to speak. That Cox and Nelson were never partners in the contract, can rest only upon the assumption that the memorandum attached to each [\*21] name \*subscribed, is parcel of the contract or a qualification of it; binding with respect to the other party, the Postmaster-General, and not merely binding as between the other contractors.

But there is no pretence at all for this assumption. The contract is express. All the contractors bind themselves to perform the mail coach service to Stroud and Chalford and back; that is, all are bound jointly and severally for the whole duty. The memorandum is only a note, possibly not at all binding on any of the contractors, except as notice of an arrangement among themselves—certainly in no wise binding upon the Postmaster-General. After an agreement so explicit, by such express words as are contained in the contract, nothing but the most positive expressions in any note attached to the signatures could operate an exception, restriction, or qualification; and all we have here are the words “to Benson,” affixed to one execution, and “to Chalford” affixed to the other.

It is unnecessary to make any observation on the cases which were cited; nor is there anything in what I have here laid down, which at all questions either. *Ex parte Barrow*, (a) *Brown v. De Tastet*. (b)

But assuming that Cox cannot be heard to deny a general partnership in the contract as between himself and the Postmaster-General, and, consequently, between himself, and whoever should by the Postmaster-General be validly put in Nelson's place in whole or in part, that is, put in his place according to the power given; there still remains the difficulty in the plaintiff's case, that the power was not pursued, because Cox [\*22] had not his \*option, no notice having been given to him of Nelson's retiring from a part of his share; and I agree with his Honor that this would be fatal, if no subsequent waiver, or affirmation, or adoption, or anything equivalent to waiver on Cox's part had taken place. But as no direct and express stipulation for notice, nor any condition directly in terms imposing the necessity of notice is to be found in the contract; and as we only get at the necessity of it by implication raised upon the option given to take the share relinquished, there can be no doubt

(a) 2 Rose, 252.

(b) Jac. 284.

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that slight circumstances will operate as a repudiation of the option; and if the option was repudiated, that is quite sufficient to let in the power of appointing a successor to the vacant share; nay, it seems more directly the case for the Postmaster-General appointing, than if notice had been given.

Now it is not denied that Cox knew of Lovegrove's introduction into the concern. It happened in June, 1831, and Lovegrove continued to perform the part of the contract abandoned by Nelson till April, 1832; and the bill alleges expressly, that Cox had full knowledge of Lovegrove's working the part of the road given up by Nelson all that time, or ten months. Does Cox in his answer deny this? Nothing of the kind; he rather admits it in point of fact; for he says, that he, Nelson, and Lovegrove continued to horse the coach till April, 1832, though he says that Lovegrove did it under a separate contract with Nelson. The Master of the Rolls admits that he should have been bound to decide for the plaintiff, if he had believed that Cox knew of Lovegrove's appointment by the Postmaster-General. Now, suppose the bill and answer, and the inference inevitably arising from Cox's manner of evading the question of knowledge, were out of the case, and that all had rested upon the admitted fact of Lovegrove having for ten months horsed the

\*coach, is it possible to doubt that Cox knew that fact? [\*23] The nature of the concern renders it absolutely impossible he should have been ignorant of it, unless he was confined all the while to his bed, and incapable of attending to any business, and he does not pretend that this was the case for any part of the time. Then, if he knew the fact of Lovegrove being engaged on a part of the road, that is decisive; for he knew the provisions of the contract with the Postmaster-General, which he had himself signed; and that contract expressly provides for the manner in which any new party shall be introduced. The best he can say is, that he supposed Lovegrove was employed under the power given to the Postmaster-General to employ any one he pleased, if any part of the work were left undone by the contractor; and that power is only given him in case the others do not perform the work abandoned.

Therefore the fact of Lovegrove horsing the coach for a portion of the road, was proof to Cox that some one had given up or been removed; and if such resignation or dismissal had happened, he well knew his own right under the contract to do the work abandoned if he pleased. When he found Lovegrove doing it, and knew he had himself received no notice so as to give him the option, his business was at once to object and tender himself as ready and willing to perform it. It is not pretended he did anything of the kind; indeed, his case rests on an erroneous construction of the agreement, which precluded the possibility of his

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doing so ; and if he did not, he manifestly waived his option or rather, he exercised it by declining, and so affirmed Lovegrove's nomination by the Postmaster-General. It needs hardly be added, that Nelson expressly admits his knowledge of Lovegrove's appointment and contract with the Postmaster-General, and his full concurrence in both.

[\*24] \*But what is proved in evidence to have passed with Mr. Wakefield I think extremely material, and of itself sufficient to show Cox's knowledge of the contract between Lovegrove and the Postmaster-General, and of Lovegrove receiving part of the profits of it ; and I will take it from the Master of the Rolls' own abstract in his judgment : "It is true that Wakefield, the agent of Cox, says in his evidence that he met Mr. Lovegrove at the office of Mr. Johnson, the superintendent of mail coaches, and that he there learnt that Mr. Lovegrove had received from the Postmaster-General that portion of the mileage which was due in respect of the horsing from Maidenhead to Benson."

Upon this his Honor proceeds to observe as follows : "Nelson had fully consented to Lovegrove receiving that portion of the mileage, and therefore, if there had been no engagement whatever with the post-office, Wakefield would not have been surprised that Lovegrove had received that mileage, because, according to the whole conduct of Nelson and of Lovegrove, it was clear that Nelson would have permitted Lovegrove to receive it."

But one consideration is quite fatal to this reasoning. Cox must have known the contract with the Postmaster-General, to which he was an executing party. By that contract no one would be employed by Nelson or anybody else without the Postmaster-General's leave. No one could take Nelson's duty or receive his mileage without the Postmaster-General's approval and consent ; and this consent could in no case be given without the other contractors first exercising their option of themselves doing the work relinquished ; therefore Cox on learning, as is proved in evidence, that Lovegrove received mileage, and did duty on Nelson's portion of the road, also learnt that Nel-

[\*25] son had relinquished his part, and \*that he himself might, had he chosen, have taken that part. If he did not, he exercised the option by refusing, and affirmed Lovegrove's appointment.

The Master of the Rolls dismissed the bill without reserving power to the plaintiff to proceed against Nelson, although he distinctly admits that his whole argument against the plaintiff is confined to Cox's want of notice. On this ground alone, the present decree never could have stood.

But his Honor also intimates this objection to the pleadings—

1834.—Weiss v. Dill

that if Lovegrove sues Nelson, he may proceed against Cox as a co-defendant, by putting his case entirely on Cox's assent to his (Lovegrove's) working the coach. But the bill contains a distinct averment against Cox to this very effect, which seems to have escaped his Honor's notice. It is in these words: "That plaintiff employed his horses in the conveyance of the said mails and coaches from the date of the contract, 8th of June, 1831, down to the 4th of April, 1832, between Maidenhead and Benson, with the full knowledge and concurrence of, or without any objection by, or on the part of the said defendants or either of them; and the said defendants during such time well knew, and were aware, or had reason to believe, and did respectively believe or suspect that plaintiff did so convey and horse the mails."

Upon the whole, I have no doubt that the decision must be reversed, and the account taken as prayed, and the deposit returned.

## \*WEISS v. DILL.

[\*26]

ROLLS.—1834: 22d January.

Executors will not be allowed to charge for the employment of an agent, except under very special circumstances.

An exception to the Master's report, by which he had reduced an executor's charge for the employment of an agent at 5 per cent. to 2 1-2 per cent., overruled.

THIS was an exception on the part of the defendants to the Master's report. The testator, Jacob Weiss, who had carried on an extensive business as a tailor, bequeathed the residue of his personal estate upon trust for his wife and children, and he appointed the defendants, Dill and Broughton, his executors. He directed his debts to be collected with all convenient speed, and that his executors, or the survivor of them, should, at their or his discretion, carry on the business, and apply the profits to the same trusts as those declared with respect to his personal estate. No legacy was given to the executors. The defendants employed an agent to collect the testator's debts, and the agent had collected debts to the amount of 2,000*l.*, upon which he charged a commission of 5 per cent. This charge of 5 per cent for agency was disallowed by the Master in the executors' accounts, and reduced to 2 1-2 per cent. To that disallowance the present exception was taken.

Mr. *Bethell*, in support of the exception:—It is usual, under special circumstances, to allow executors to employ agents at a reasonable commission in the management of the affairs of their testators. Thus in *Henderson v. M'Iver*,<sup>(a)</sup> the court held that

(a) 3 *Mad.* 275.

1834.—Weiss v. Dill

an executor was justified in employing an accountant in his testator's affairs, and in charging for the expense thereby incurred.

In *Wilkinson v. Wilkinson*(a) where annuities were given [\*27] to trustees for their trouble, and the testator \*died possessed of houses let at weekly rents, it was held that the trustees were justified in employing, at a certain charge, a collector of the weekly rents, and did not thereby forfeit their right to the annuities. In the present case, the debts were very numerous; and the payment of them was not obtained until after repeated applications. It was proved, indeed, by the finding of the Master, that this was a proper case for the employment of an agent, and, that point being conceded, the only question was, whether the charge of 5 per cent. made by the agent was not moderate and usual.

Mr. Pemberton and Mr. Richards, *contra*, said there was no precedent for such an exception as this, nor were there any special circumstances in the case, which was no other than that of an ordinary tradesman's book debts. No allowance whatever for agency ought to have been made; but the Master having made such an allowance as he thought reasonable, the court could not entertain an exception to his decision. This was as much a matter within the exclusive jurisdiction of the Master, as a question of costs.

THE MASTER OF THE ROLLS:—Generally speaking, executors are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred by the employment of agents. It is for the Master to determine, whether an executor who makes a claim for the employment of an agent, ought to be allowed to charge his testator's estate with such a burden. The Master has here thought that the executor ought not to be allowed to charge the testator's \*estate with the whole commission claimed, but that 2 1-2 per cent. is a fit allowance. I have some doubt whether, in this case, the Master ought to have made any allowance; but with the allowance of 2 1-2 per cent., which he has made, the defendants must be content.

Exception overruled.

(a) 2 Sim. & Stu. 237.



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 1834.—Hartley v. Hewitt.
 

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## HARTLEY v. HEWITT.

ROLLS.—1834: 24th January.

When the Master, upon a reference as to the priority of incumbrancers, reports against the priority of a particular party, and states the facts upon which he had come to that conclusion, the regular course is to take an exception to the conclusion, and not to take exceptions to the particular facts, because the Master's conclusion may be correct, though particular facts be mistaken.

In this case, forty-three exceptions had been taken to the Master's report. At the hearing of the cause, it had been referred to the Master to state the priorities of several parties to the suit, who claimed a lien upon certain valuable paintings; and the Master had reported in favor of the plaintiff Hartley, that he had a priority to the defendant Hewitt, except as to a sum of 200*l*. The Master, in his report, stated the several facts which were in evidence before him, and upon which he came to his conclusion against the defendant Hewitt's priority. The defendant Hewitt, in addition to an exception against the conclusion of the Master, had filed exceptions to the Master's finding of every fact upon which he founded his conclusion.

Mr. *Bickersteth*, in support of the exceptions.

Mr. *Pemberton*, *contra*.

The MASTER OF THE ROLLS held, that this mode of excepting was altogether irregular, and that exceptions would not lie to particular facts stated, because it might happen that many of those facts were mistaken by the Master, and his conclusion be nevertheless well founded. \*The exceptions [\*29] should apply to the conclusion only; and in the argument of that exception it would be the proper course to question the accuracy of the facts upon which the Master appeared to have proceeded.

## MANNING v. THESIGER.

ROLLS.—1835: 28th and 29th July.

A testatrix gave the sum of 100*l* to be paid to her brother C. T., immediately after the decease of her husband and in default of issue of their marriage; and, in a subsequent part of her will, she gave 100*l* to the same brother, and concluded her will by directing that legacies, to which no time of payment was affixed, should be paid within three months after the death of her husband: Held, that the testatrix intended only to give a single legacy of 100*l* to C. T.

THE will of Mary Welsford, made in execution of a power, contained the following bequests: "I give to my brother, Christopher Thornton, of London, from and immediately after the de-

1835.—*Manning v. Thesiger*.

cease of my husband Roger Welsford, and in default or failure of issue of our marriage, the sum of 100*l.* sterling. Also to my said brother, Christopher Thornton, one clear annuity or yearly sum of 50*l.* sterling, for and during the term of his natural life, to commence from the day of the decease of my said husband, Roger Welsford, and such default or failure of issue as aforesaid, and to be paid to him half yearly. Also to my brother, Christopher Thornton, of or near the city of London, the sum of 100*l.* sterling." The testatrix concluded her will by directing that all and every the legacies and sums of money given by her will, wherein no time was specified as to the payment thereof, were to be paid within three months after her husband's decease, and such default or failure of issue as aforesaid.

There was no issue of the marriage; and the question was, whether the second legacy of 100*l.* given to Christopher Thornton, was or was not accumulative.

Mr. *W. C. L. Keene*, in support of the claim of Christopher Thornton, argued, that where two sums of \*the same amount were given in a will to the same person, although the general rule was undoubtedly against double legacies, yet slight circumstances were sufficient to show that the second gift was meant to be accumulative. In *Mackenzie v. Mackenzie*,<sup>(a)</sup> a testator gave by his will the sum of 5,000*l.*, to be paid to his reputed son on his attaining twenty-four, with power to his executors previously to apply any part of the principal or interest to the maintenance and education of the legatee; and by a codicil, the testator gave the same sum to be paid to the same legatee on his attaining twenty-four, but without any direction as to the previous application of the principal or interest. Upon the ground of that difference, Lord Eldon held that the legacy given by the codicil was not a substitution for that given by the will. In the present case, the first legacy of 100*l.* was directed to be paid to Christopher Thornton immediately after the death of the testatrix's husband, and in default of issue of the marriage of the testatrix and her husband; the second legacy of 100*l.* was given without any direction as to the time of payment, or any reference to the contingency of her dying without issue. If the will had stopped at the gift of the second legacy, it might have been said that the omission of any direction as to the time of paying the second legacy was accidental; but that argument could not be resorted to, because the testatrix had expressly declared that, where she had given legacies and affixed no time of payment, she meant such legacies to be paid within three months after the decease of her husband. The circumstances distinguish-

(a) 2 Russ. 262.

1835.—Tompson v. Browne.

ing the two gifts were quite sufficient to show that the testatrix intended the second legacy of 100*l.* to be accumulative. In *Guy v. Sharp*,<sup>(a)</sup> one of the latest cases on this subject, where \*a legacy given by a codicil was held to be in [\*31] addition to one given by the will, it was said that the court will deal anxiously, and in minute detail, with the expressions employed by a testator in order to arrive at his intention upon the question, whether a legacy is accumulative or substitutional.

Mr. *Tinney*, *contra*.—The general rule is, that where the same sum is twice given to the same legatee, the second gift is to be considered, not as accumulative, but as a mere accidental repetition of the first. *Duke of St. Albans v. Beauclerk*,<sup>(b)</sup> *Holford v. Wood*,<sup>(c)</sup> *Garth v. Meyrick*.<sup>(d)</sup> This rule is not to be departed from, unless it can be clearly shown to have been the intention of the testator to give the second legacy in addition to the first; and in the present case, the circumstances relied upon as indicating such an intention, are much too slight to justify such a conclusion.

*July 29th.*—THE MASTER OF THE ROLLS :<sup>(e)</sup>—I am of opinion that the testatrix in this case intended only to give a single legacy of 100*l.* to Christopher Thornton.

(a) 1 Mylne & Keen, 589.

(d) 1 Bro. C. C. 30.

(b) 2 Atk. 636.

(e) Sir C. Peppar.

(c) 4 Ves. 76.

\*TOMPSON v. BROWNE.

[\*32]

ROLLS.—1835: 29th July.

An instrument vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary, and, consequently, not liable to the payment of legacy duty.

By an indenture of settlement, dated the 19th day of August, 1823, and made between Nathaniel Coffin of the first part, Mary Wattle of the second part, the plaintiff, Elizabeth Wattle Tompson, by her then name of Elizabeth Wattle Coffin, and Ann Wattle Coffin, therein respectively described as the natural daughters of Nathaniel Coffin and Mary Wattle, of the third part, and the defendants Augustus Browne and John Coulson of the fourth part, and which was duly executed by Nathaniel Coffin, Augustus Browne and John Coulson respectively, after reciting that Nathaniel Coffin was desirous of making some provision for the said Mary Wattle, Elizabeth Wattle Coffin and Ann Wattle Coffin, in the events thereafter mentioned, and had, therefore,

1835.—*Tompson v. Browne*.

then lately transferred into the joint names of Augustus Browne and John Coulson, the sum of 6,090*l.* new 4 per cent. bank annuities, to be held by them upon the trusts thereafter mentioned; it was witnessed that they, the said Augustus Browne and John Coulson, and the survivor, &c., should stand possessed of the said stock, and the interest and dividends thereof, upon trust in the first place to pay to or permit and suffer the said Nathaniel Coffin, or his assigns, to receive and take the interest, dividends, and annual produce of the said sum of 6,090*l.* 4 per cent. bank annuities for his own use and benefit for his life, and, from and after his decease, upon trust, that they, the said trustees, &c., should appropriate and set apart in their names so much of the said sum of stock as by, and out of the interest and dividends thereof would produce the clear annuity of 80*l.*, upon [\*33] trust to receive the dividends thereof, and \*pay the same to the said Mary Wattley for her life for her use; and as to all the rest and residue of the said sum of 6,090*l.*, new 4 per cent. bank annuities, which should remain after making such appropriation as aforesaid, and as to that part of the same annuity which should be so set apart and appropriated from and after the decease of the said Mary Wattley upon further trust to pay, assign and transfer the same, and the interest, dividends and income thereof, unto, and between Elizabeth Wattley Coffin and Ann Wattley Coffin, in equal shares and proportions as tenants in common, to be vested in and paid, assigned, or transferred to them respectively, when, and as they should attain the age of twenty-five years, or be married: and the settlement contained a power to Nathaniel Coffin to revoke the uses and trusts thereby limited, and appoint any new trusts in lieu thereof in manner therein mentioned.

In the year 1826, John Coulson died, and the defendant John Barber was appointed a new trustee by virtue of a power given by the settlement for that purpose, and the stock was transferred by the surviving trustee into the joint names of himself and the new trustee.

In October, 1831, Nathaniel Coffin died, without having exercised the power of revocation contained in the settlement, leaving the plaintiff, Mary Wattley, then Elizabeth Wattley Coffin, and Ann Wattley Coffin surviving him. The trustees set apart so much of the stock as was sufficient to answer the annuity of 80*l.* given to Mary Wattley, and transferred to the plaintiff, Elizabeth Wattley Coffin, who had attained her age of twenty-five, a moiety of the residue. In February, 1832, Elizabeth Wattley Coffin intermarried with the plaintiff, Frederick Thompson; and in May, 1833, Mary Wattley died. Upon the death of the annuitant, the bill was filed by Fred- [\*34] erick \*Tompson and his wife against the trustees, for

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 1835.—*Tompson v. Browne.*


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the purpose of having their title declared to a moiety of the fund which had been set apart for the payment of the annuity.

The question raised by the trustees was, whether the settlement under which the plaintiffs claimed was not a testamentary instrument, and consequently liable to the payment of legacy duty.

*Mr. Bickersteth* and *Mr. Randell* for the plaintiffs.

*Mr. Piggott* for the trustees:—The doubt as to the testamentary nature of the instrument under which the plaintiffs claim, and the consequent liability of the fund given by it to the payment of legacy duty, was raised by the case of the *Attorney-General v. Jones*,<sup>(a)</sup> which was decided in the Court of Exchequer. In that case three judges out of four held that a settlement by which the grantor reserved to himself the dividends of a sum of stock for his life, with limitations to take effect upon his decease, and a power of revocation, was substantially a testamentary instrument, and subject to legacy duty. It is true that the case of the *Attorney-General v. Jones* differs, in some of its circumstances, from the present, inasmuch as there the maker of the instrument never parted with the deed, or communicated its contents to the trustees, or transferred the stock into their names; but the frame of the instrument is exactly the same in both cases, and it was considered here, therefore, that the trustees could not safely part with the whole fund without having the opinion of the court upon the point.

*Mr. Bickersteth*, in reply:—The special circumstances [\*35] in the *Attorney-General v. Jones* are abundantly sufficient to distinguish that case from the present, supposing the authority of the *Attorney-General v. Jones* to be free from question; but that decision has never been acquiesced in, and the reasoning of *Mr. Baron Wood*, who differed from the other judges, is unanswerable. The test for determining, in cases of this description, whether an instrument be testamentary or not, is this; does the legal estate in the property which is the subject of disposition pass by it? If the legal estate passes at the time of execution, the instrument cannot be a will; and if it be a deed, it cannot fall within the jurisdiction of the ecclesiastical courts, or be properly proved as a will, so as to become subject to legacy duty. A power to revoke the uses of a deed may be lawfully reserved by the grantor, and such a power cannot possibly convert the deed into a testamentary instrument, either for the purpose of aiding the revenue, or for any other purpose.

(a) 3 Price, 368.

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1835.—*Tompson v. Browne*.

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1835.—Tompson v. Browne.

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Mr. *Piggott* for the trustees :—The doubt as to the testamentary nature of the instrument under which the plaintiffs claim, and the consequent liability of the fund given by it to the payment of legacy duty, was raised by the case of the *Attorney-General v. Jones*,<sup>(a)</sup> which was decided in the Court of Exchequer. In that case three judges out of four held that a settlement by which the grantor reserved to himself the dividends of a sum of stock for his life, with limitations to take effect upon his decease, and a power of revocation, was substantially a testamentary instrument, and subject to legacy duty. It is true that the case of the *Attorney-General v. Jones* differs, in some of its circumstances, from the present, inasmuch as there the maker of the instrument never parted with the deed, or communicated its contents to the trustees, or transferred the stock into their names; but the frame of the instrument is exactly the same in both cases, and it was considered here, therefore, that the trustees could not safely part with the whole fund without having the opinion of the court upon the point.

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(a) 3 Price, 368.

1834.—*Fortescue v. Barnett.*

THE MASTER OF THE ROLLS : (a)—The decision in the *Attorney-General v. Jones* seems to have proceeded upon the ground that, under the circumstances of that case, nothing passed from the maker of the instrument so as to entitle any other person to interfere with his property in his lifetime. If there be anything in that decision to support the notion, that where a person by deed settles property to his own use during his life, and after his decease for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject [36] \*to legacy duty, I can only say that, if this were law, a great number of transactions of which the validity has never been doubted would be liable to be impeached.

(a) Sir C. Peppys.

## FORTESCUE v. BARNETT.

ROLLS.—1834: 20th January.\*

J. B. made a voluntary assignment, by deed, of a policy of assurance upon his own life for 1,000*l.*, to trustees, upon trust for the benefit of his sister and her children, if she or they should outlive him. The deed was delivered to one of the trustees, and the grantor kept the policy in his own possession. No notice of the assignment was given to the assurance office, and J. B. afterwards surrendered, for a valuable consideration, the policy and a *bonus* declared upon it, to the assurance office. Upon a bill filed by the surviving trustee of the deed, to have the value of the policy replaced, the court held that, upon the delivery of the deed, no act remained to be done by the grantor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed.

THE defendant, John Barnett, shortly after the intermarriage of his sister, Mary Barnett, with Henry White, executed an indenture, dated the 17th of December, 1813, and made between himself of the first part, the said Henry White, since deceased, of the second part, Mary White, the wife of Henry White, of the third part, and the plaintiff William Fortescue, and Thomas White, deceased, of the fourth part, whereby, after reciting that the Equitable Assurance Society had, by a policy of assurance, dated the 27th of September, 1811, assured to be paid to the executors, administrators and assigns of John Barnett after his decease, 1,000*l.*, on payment of the annual premium of 25*l.* 11*s.*, it was witnessed that in consideration of the marriage then lately solemnized between Henry White and Mary White, and for making some provision for the said Mary White and her child and children, if she, or any such child or children, should survive John Barnett, he, the said John Barnett, assigned and transferred to William Fortescue and Thomas White the said



1834.—*Fortescue v. Barnett.*

policy of assurance, and the sum of 1,000*l.* thereby assured, and \*all interest and produce to become due or [\*37] payable by virtue thereof, and all his right and interest therein, to hold to William Fortescue and Thomas White, their executors, administrators, or assigns upon trust, in case Mary White and all and every her child and children should happen to die in the lifetime of John Barnett, for John Barnett, his executors, administrators and assigns, and to re-assign the same to him and them accordingly; but if Mary White, or any child or children of Mary White, should happen to outlive John Barnett, then in trust, that William Fortescue and Thomas White, their executors, administrators or assigns, should invest the said sum of 1,000*l.*, and all other money which should become due on the said policy, in the public stocks or funds upon the trusts therein declared for the benefit of Mary White and her child or children. The deed contained a covenant on the part of John Barnett for himself, his executors and administrators, to pay and keep up the annual premiums payable upon the policy.

This deed was delivered to Thomas White, one of the trustees named therein, and remained in his possession till his death, which happened in October, 1832; but the defendant Barnett retained possession of the policy of assurance.

Shortly after the death of Thomas White, the deed was sent by one of his executors to William Fortescue, the surviving trustee, who, upon application at the office of the Equitable Assurance Society, was informed that no notice had ever been given to the society of the assignment of the policy; that in July, 1830, a *bonus* of 795*l.*, payable upon the death of John Barnett, had been declared on the policy, which *bonus* was surrendered by Barnett to the society in the same month of \*July, in consideration of the sum of 394*l.* 15*s.*; and that [\*38] in November, 1832, Barnett surrendered the policy itself to the society, in consideration of the further sum of 326*l.* 13*s.*

The bill was originally filed by Fortescue against Barnett alone, for the purpose of compelling him to replace or give security for the value of the policy and *bonus* so surrendered, and of all *bonuses* which might have accrued, or have been capable of being declared thereafter, if the policy had not been surrendered; but the defendant demurred to the bill for want of parties, and, the demurrer being allowed, Mrs. White and her children were made parties by amendment, leave having been given for that purpose.

The bill prayed that the defendant Barnett might be decreed to pay to the plaintiff, or otherwise secure upon the trusts of the indenture of the 17th December, 1813, the sum of 1,795*l.*, being the amount of the sum secured by the policy, together with the *bonus* declared thereon, and such further sum as should be suffi-

1834.—Fortescue v. Barnett.

cient to answer all future *bonuses* which, according to the regulations of the Equitable Assurance Company, would have accrued due in respect of the policy, if it had not been surrendered.

The defendant Barnett, by his answer, stated that the settlement of the policy was a mere voluntary act on his part, and made out of his personal regard for his sister; and that he executed the settlement under the impression that he should have the control of the policy during his life, and power, if he thought fit, to revoke or alter the disposition of the same. He further stated that the policy had been surrendered after the death of

Mrs. White's husband, and with her consent, in order [\*39] \*to save the expense of the annual premium, and with the understanding that the amount of the premium should be annually paid to Mrs. White, which had, in fact, been done. The defendant further stated that, at the time of surrendering the policy, he executed a codicil to his will, whereby he made a provision for Mrs. White and her children to the extent of 1,000*l.*, and that he put Mrs. White, at the same time, into possession of a freehold estate of the value of 400*l.*, of which she had ever since received the rents and profits, and that he had devised such freehold estate to her eldest son by his will.

The question in the cause was, whether the defendant was or was not bound to replace or give security for the value of the policy.

Mr. *Bickersteth* and Mr. *Willcock*, for the plaintiff:—There can be no question that the gift was in this case a complete gift, passing the legal interest in the policy to the trustees; for the deed of assignment, which transferred the policy, and also the defendant's right and interest in it, was actually delivered by the grantor to one of the trustees, in whose possession it remained until his death, when it was handed over to the plaintiff, the surviving trustee. The plaintiff was bound, as well with a view to his own liabilities, as to the protection of the interests of the *cestuis que trust*, to call upon the court to compel the defendant to replace or give security for the value of the policy, the proceeds of which he had applied to his own use under the notion that the gift was revocable. Even if Mrs. White had acquiesced, as was said in the acts of the defendant, she was not the only *cestuis que trust*; her infant children were to be protected, and [\*40] if the plaintiff had not provided for their \*protection by instituting this suit, he would have been responsible to them for the whole fund which had been diverted from its purpose by the defendant. Neither the circumstance of the settlement being made without valuable consideration, nor that of the defendant having retained the policy assigned by the settlement in his possession, can affect the rights of the parties upon whom

1834.—*Fortescue v. Barnett.*

the settlement was made, as between them and the grantor. A settlement duly executed, of which the trusts are declared, whether voluntary or not, is good against all the world except creditors or purchasers, and the grantor cannot, by any subsequent act, revoke or defeat the trusts of such a settlement. *Barlow v. Heneage*, (a) *Bale v. Newton*. (b. In *Sear v. Ashwell*, (c) a voluntary deed in favor of younger children, though retained in the possession of the grantor, and afterwards destroyed by him, was established against legatees; and in *Bolton v. Bolton*, (d) a voluntary deed executed in favor of younger children was held not to be revoked by a subsequent will. In *Ex parte Pye*, (e) Lord Eldon said, "It is clear this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it." The only question in the present case, therefore, is, whether anything was wanting to the completion of the gift under the settlement. It appears upon the authorities, that even if the grantor had kept the deed itself in his possession, he could not have defeated the trusts which he had once created; still less could he defeat those trusts by the mere non-delivery of the policy. The gift of all the defendant's interest in the policy was perfect upon the delivery of the deed of assignment; and if notice of the \*assignment had been given [\*41] to the assurance office by the trustees, or *cestuis que trust*, the defendant could not have taken the steps to which he had resorted for the purpose of defeating his own grant. The omission of the trustees to give such notice cannot affect the interests of the *cestuis que trust*, and it is the interests of the infant *cestuis que trust*, which it is the main object of this suit to protect.

Mr. Rolfe for the widow, disclaimed any desire on her part to obtain relief in this suit, to which she was an unwilling party. The defendant had been her greatest benefactor, and she was satisfied that whatever steps he had taken in this transaction had been taken with a view to her benefit, and the interests of her children.

Mr. Pemberton and Mr. W. C. L. Keene, for the defendant Barnett, said there could be no doubt that where a trust was declared by deed, and the legal interest in the property which was the subject of the trust passed to the trustees, the court would execute the trust; whether the deed were voluntary or not. But, on the other hand, where a person only bound himself to do an act which did not pass the interest at law, but left something to be done to complete it, there, if the instrument

(a) Proc. Ch. 211.

(b) 1 Vern. 464.

(c) 3 Swanst. 411, n.

(d) 3 Swanst. 414, n.

(e) 18 Ves. 149.

1834.—*Fortescue v. Barnett.*

were voluntary, this court would not interfere to give effect to it. Thus, in *Coleman v. Sarrell*,<sup>(a)</sup> which was the case of a voluntary assignment of stock by deed, no actual transfer of the stock having been made, the court refused to assist the volunteer. The same principle was recognized in *Ellison v. Ellison*,<sup>(b)</sup> by

Lord Eldon, who said, "I take the distinction to be, that [\*42] if you want the assistance \*of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant; but, if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court." The doctrine founded upon this distinction was laid down to the same effect in *Pulvertoft v. Pulvertoft*,<sup>(c)</sup> and in *Ex parte Pye*, and *Ex parte Dubost*.<sup>(d)</sup> Now to apply this doctrine to the present case, the thing assigned here was a security for a debt payable after the death of the assignor—a *chose in action* secured to the assignor's executors, administrators and assigns. What difference could there be between a sum of stock, and a sum of money secured by a bond or policy of assurance? An assignment of stock by deed, no actual transfer of the stock having been made, and an assignment of a policy of assurance by deed, the policy remaining in the hands of the grantor, stood upon exactly the same footing, where the assignee was a volunteer, and, in that character called upon the court for its assistance. In both cases something remained to be done by the grantor; the gift was not complete, but executory, and the court would not execute a voluntary covenant.

THE MASTER OF THE ROLLS:—In the case of a voluntary assignment of a bond, where the bond is not delivered, but kept in the possession of the assignor, this court would undoubtedly, in the administration of the assets of the assignor, consider [\*43] the bond as a debt to the assignee. There is a plain distinction between an assignment of stock where the stock has not been transferred, and an assignment of a bond. In the former case the material act remains to be done by the grantor, and nothing is, in fact, done, which will entitle the assignee to the aid of this court until the stock is transferred; whereas the court will admit the assignee of the bond as a creditor.

In the present case the gift of the policy appears to me to

(a) 1 Ves. jun. 50.

(b) 6 Ves. 662.

(c) 18 Ves. 99.

(d) 18 Ves. 140.

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1834.—*Armstrong v. Armstrong.*—*Lewis v. Armstrong.*

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have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant, if the trustees had given notice of the assignment to the assurance office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor which, to assist a volunteer, this court would not compel him to do. I am of opinion that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment; but their omission to give notice cannot affect the *cestuis que trust*. The defendant appears to have acted in this transaction with the purest intentions, but he has rendered himself amenable to the jurisdiction of this court, and he must give security to the amount of the value of the policy assigned by the deed of settlement. The plaintiff is entitled to costs.

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The decree was as follows:—His Honor doth order, “that the defendant, John Barnett, do enter into security to be answerable to all the parties who are or shall become entitled under the trusts of \*the indenture of the 17th of December, [\*44] 1813, to the value of the policy of assurance effected in the Equitable Assurance Office, and bearing date the 27th of September, 1811, for 1,000*l.* in the indenture mentioned, together with the *bonuses*, which, according to the rules and regulations of the said assurance office, have been declared, or might have been declared, or would hereafter have been [capable of being] declared on the said policy if the same had been kept up, and such security is to be settled by the Master in rotation. And it is ordered, that the said defendant, John Barnett, do pay the costs of the suit.”

Reg. Lib. A. 1833, fo. 433.

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\**ARMSTRONG v. ARMSTRONG AND WARNER.*—*ARM-* [\*45]  
*STRONG v. ARMSTRONG AND LEWIS.*

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*WARNER v. ARMSTRONG.*—*LEWIS v. ARMSTRONG.*

ROLLS.—1834: 21st January. L. C.—14th, 15th and 21st November.  
An agreement for a secret partnership, is a contravention of the laws made for regulating the business of a pawnbroker, and no legal partnership is thereby constituted. Upon the trial of an issue, a bill of exceptions for an alleged misdirection of the judge will not lie; but the regular course is to apply to the court which directed the issue, for a new trial.

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1834.—*Armstrong v. Armstrong*.—*Lewis v. Armstrong*.

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By an indenture made the 24th day of June, 1810, between Samuel Shephard Warner of the one part and Robert Armstrong, pawnbroker, of the other part, reciting that the said Samuel Shephard Warner and Robert Armstrong had consented and agreed to become co-partners and joint traders in the trade or business of a pawnbroker, which Robert Armstrong then carried on in Baldwin's Gardens, it was witnessed that Samuel S. Warner and Robert Armstrong, in consideration of the good opinion they entertained of each other, and also in consideration of the sum of 2,000*l.* advanced by Samuel S. Warner to Robert Armstrong, did thereby mutually covenant, promise and agree to and with each other to be and continue co-partners and joint traders in the trade or business of a pawnbroker, for and during the term of fourteen years, to commence from the day of the date thereof, determinable nevertheless as thereafter mentioned, and the same joint trade or business was to be managed and carried on in Baldwin's Gardens aforesaid, in the house wherein Robert Armstrong then carried on the same, or in any other place or places that the said parties thereto might think prudent or advisable for that purpose; and it was thereby further agreed by and between the said parties thereto, that they should and would during the term and continuance of such co-partnership, [\*46] keep such and so many books of account as should be proper and necessary for carrying on the said business, wherein from time to time should be fairly entered exact and true accounts of all their loans, buyings, sellings, receipts and payments, with the circumstances of the dates, sums and parties, and of all their other transactions relating to the said trade or business, which book or books should remain with and be kept by Robert Armstrong in such safe and convenient place, and in such manner, that the said Samuel S. Warner should at all times have free liberty to inspect and examine the same, and take copies or extracts thereof; and it was thereby further agreed, that the said trade or business of a pawnbroker should be conducted and carried on by Robert Armstrong, who should be at liberty to employ such journeymen, servants or apprentices as to him should seem necessary and expedient for conducting or carrying on the said trade or business of a pawnbroker; and it was further agreed, that the said parties thereto should once in every three months examine their books of accounts and join in making up the same, and balance, adjust and settle the same accordingly, the first examination and adjustment to take place on Michaelmas day next ensuing the date thereof, at which time Samuel S. Warner should receive and take the sum of 50*l.* out of the said co-partnership concern, as and for his share and proportion of the profits arising therefrom, and the like sum of 50*l.* at every subsequent adjustment and set-

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1834.—*Armstrong v. Armstrong*.—*Lewis v. Armstrong*.

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tlement which it was thereby agreed should take place quarterly during the continuance of the co-partnership; and it was thereby further mutually agreed, that in case either of the parties thereto should be minded and desirous of putting an end to and determining the co-partnership at the end of the first three, seven or ten years of the said term of fourteen years, and should give twelve calendar months' notice or warning in writing to the other of \*such his mind and intention, that then and [\*47] in such case this co-partnership should cease and determine as if the whole term of fourteen years had been suffered to run out and expire; and further that, at the dissolution of the co-partnership, Samuel S. Warner should be at liberty to draw out of the co-partnership concern the said sum of 2,000*l.* so advanced by him; and it was further agreed by and between the parties thereto, that during the continuance of the co-partnership, it should not be lawful for the said Robert Armstrong to discount any promissory note or bill of exchange without the license and consent of Samuel S. Warner first had and obtained, and in case Robert Armstrong should without such license and consent discount any such note or bill, he should forfeit and pay to Samuel S. Warner 100*l.* for every such note or bill so discounted; and lastly, it was agreed, in case Samuel S. Warner should, at any time during the continuance of the co-partnership, advance a sum of money equal to that which the said Robert Armstrong might at that time have engaged in the said trade or business of a pawnbroker, that then and in such case he the said Samuel S. Warner should be entitled unto and receive an equal share and proportion of the profits arising therefrom, after deducting such a sum yearly, as an allowance to Robert Armstrong for his trouble in the management of the said trade or business, as any two persons in the trade might think an adequate compensation for such management.

Warner advanced the sum of 2,000*l.*, and he afterwards from time to time between the years 1810 and 1816 made further advances by way of further capital, on which he received 10 per cent. as liquidated profits thereon; and such further advances were regularly indorsed upon the indenture of June, 1810. The capital thus advanced by Warner, including the original 2,000*l.*, \*amounted in the month of June, 1816, to 4,300*l.*, [\*48] and 10 per cent. upon it had been regularly paid to him down to that time.

On the 28th of April, 1819, Robert Armstrong executed a deed, whereby, after reciting a lease to him of the premises in Baldwin's Gardens, at which the business was carried on, and that he was possessed of certain stock in trade and pledges and other property, he assigned the same to Thomas Wood and Samuel S. Warner, upon trust, among other things, after his

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decease, to permit and suffer his wife Betty Armstrong to take and have possession of the said premises, stock in trade, pledges, debts, &c., and all other property that the said Robert Armstrong might be possessed of, interested in or entitled to at the time of his decease, to carry on in her own name the trade or business which Robert Armstrong then carried on, or should at the time of his death carry on in his said shop and premises during the continuance of the said lease, and so long as she should continue the widow of Robert Armstrong, and to receive and take the profits of the said business for the support and maintenance of herself and such of the children, whether sons or daughters, under the age of twenty-one years, as might continue to live with her, and upon other trusts therein mentioned for the benefit of the children of Robert Armstrong. This instrument was never executed by the trustees, and was many years after proved as a testamentary paper, and administration with this testamentary paper annexed was granted to Betty Armstrong in the month of February, 1830.

Robert Armstrong died in the month of August, 1819, without having made any direct disposition of his property by [\*49] will, leaving Betty Armstrong his widow, who \*obtained administration of his estate and effects, and six children.

Shortly after the death of Robert Armstrong, the stock in trade was taken by various persons, when Warner and Wood were present, but declined to assist in such stock-taking, alleging that they were interested in the stock as trustees under the instrument of the 10th of April, 1819; and Warner did, as such trustee, on the first of February, 1820, receive from Messrs. Nixon & Co., at whose banking-house Robert Armstrong kept cash, the sum of 11s. 6d., being the balance due, upon the banking account, to Robert Armstrong's estate.

The widow continued to carry on the testator's business of a pawnbroker, paying at first to Warner the same 10 per cent. on his advances as the testator had done; but the per centage was afterwards reduced by Warner to 8 per cent., and in the year 1822 to 5 per cent. From the time of the execution of the deed of June, 1810, to the death of Robert Armstrong, the business was carried on in Armstrong's name alone, and the license required by the act was obtained by Armstrong alone. In like manner, after the death of Robert Armstrong, the business was carried on in the sole name of the widow, and her name alone was used in the license; and Warner never in any manner interfered as partner or proprietor in the conduct of the business, but he did, occasionally, during the lifetime of Robert Armstrong, and afterwards, assist in taking the annual account of stock of goods and pledges upon the premises, such assistance being in the pawnbroking business usually afforded by pawnbrokers and other persons not interested in the particular stock taken. On



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one of those occasions he signed a memorandum in the following form: "The above \*sum formed part of the [\*50] stock of Mr. Armstrong as taken by us this 30th day of June, 1811. S. S. WARNER, W. G. PERRYMAN."

The original bill was filed in November, 1828, by the children of Robert Armstrong against his widow, and against Thomas Wood and Samuel Shepheard Warner, as trustees of the instrument of the 28th of April, 1819; and it prayed the usual accounts, and that the plaintiffs might be declared to be entitled to the benefits which they claimed under that instrument. Warner put in an answer, by which he denied that he had ever accepted the trusts of the instrument to the benefit of which the plaintiffs claimed to be entitled; stated the deed of the 24th of June, 1810, the advance of the sum of 2,000*l.*, and subsequent advances amounting to 4,300*l.*, and claimed to be interested in the estate of Robert Armstrong as surviving partner; and he filed a cross bill, making statements to the same effect, and praying for an account of the alleged partnership effects, and that his rights as surviving co-partner, under the deed of the 24th of June, 1810, might be ascertained.

Warner died in the month of May, 1829, having made a will, dated the 30th of April, 1827, which contained the following recital: "Whereas Betty Armstrong, relict of Robert Armstrong, is, and stands justly and truly indebted to me in the sum of 7,000*l.* and upwards for principal money and interest, the principal whereof has been from time to time advanced by me to her for the purpose of enabling her to carry on the business of a pawnbroker; and inasmuch as I am apprehensive that the calling in of so large a sum of money altogether at my decease would be very injurious to her in her aforesaid business, it is therefore my earnest wish, and my will and desire, and I declare, order and direct, that my \*trustees and execu- [\*51] tors for the time being do and shall, within three months after my decease, adjust and balance my account with the said Betty Armstrong, and thereupon take an account of the stock on the premises of the said Betty Armstrong, and do from time to time continue to take an account of such stock, when and so often as they may deem it necessary; and if satisfied, on such stock-taking, that there is and continues a good and sufficient security for the sum or balance due, do and shall allow the said sum of 7,000*l.*, or such other sum as may be found due at the time of my decease, to remain at interest at 5 per cent."

The original bill, filed by the children of Robert Armstrong, was revived against Lewis and others, Warner's representatives, who also revived the cross suit instituted by Warner.

The two causes were heard together in May, 1831; and at the hearing it was insisted, on the part of the plaintiffs in the ori-

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ginal bill, that the deed of the 24th of June, 1810, was not intended to constitute a *bona fide* partnership, but was merely colorable, in order to enable Warner to receive 10 per cent. upon his loans to Robert Armstrong; and further, that by the several acts of Parliament passed for regulating the business of a pawnbroker, and which were to be considered as passed for the protection of the public, there could be no dormant and secret partnership in that business. Much evidence was given in the two causes; and the Master of the Rolls directed the two following issues to the Court of Exchequer, in which the plaintiffs in the cross suit were to be the plaintiffs, and the plaintiffs in the original suit the defendants; first, whether at the death of Robert Armstrong, Samuel Shephard Warner was legally to be considered as a partner of the said Robert Armstrong, and entitled [\*52] to receive payment at the rate of 10 per cent. upon the capital advanced by him out of the profits or effects of the concern; and, secondly, if he was to be considered as such partner, and entitled to receive such payment as aforesaid, then whether he was entitled to receive such payment on a sum of 4,300*l*.

Upon the trial of these issues, the jury, under the direction of Lord Chief Baron Lyndhurst, found for the plaintiffs at law on both issues. The counsel for the plaintiffs in the original cause, being dissatisfied with the direction given by the Lord Chief Baron in point of law, tendered a bill of exceptions, which was signed and allowed by the judge.

Upon a petition presented to the Master of the Rolls, his Honor considered that no bill of exceptions would regularly lie in such a case, and that an application ought to have been made to him for a new trial of the issues; but it being deemed expedient by both parties that the question of law should be brought before the Exchequer Chamber upon such bill of exceptions, the objection to its regularity was waived. The bill of exceptions, therefore, came on to be argued in the Exchequer Chamber; (a) and the Lord Chief Justice of the King's Bench (Lord Denman) delivered the opinion of the judges to the following effect:

The court have considered this record, and the exceptions which have been taken; and it has occurred to several of the judges that these exceptions are not properly taken, and that no judgment could be given for the plaintiff in error for that reason upon this record. We are, however, of opinion that [\*53] there is another objection \*to judgment being given for the plaintiff in error upon this record, which is, that in point of fact, even supposing that it could be collected from the whole frame of it what the objection was, and that the objection

(a) The argument is fully reported in 2 Crompt. & Meeson, 284.

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could be fairly stated as arising upon the record, it does not appear, in point of fact, that any contract was made between the parties to carry on the partnership in such a manner as to contravene the acts of Parliament. That clearly is no part of the written agreement that is set out, because the words "secret" or "suppressed" are nowhere used in that agreement. It is quite possible the parties may have a collateral agreement to point to that object, and, if so, that would have the effect contended for on the part of the plaintiff in error; but that is a fact which ought to be found by the jury, and which the court cannot infer from any state of facts laid before them for their decision, and the court can only draw legal inferences from the facts found by the jury. At the same time I may state, as the general opinion of the whole court, that if there was an agreement proved to carry on the partnership in violation of those acts of Parliament, that agreement would be void, and would confer no rights on either party as against the other. It is possible that may be satisfactory without any further proceedings. We are of opinion that the judgment must be affirmed.

*January 21st.*—The two causes now came on to be heard before the Master of the Rolls for further directions.

Mr. *Tinney*, Mr. *Wakefield*, Mr. *K. Parker* and Mr. *Elderton*, for the plaintiffs in the cross bill, submitted that as both the issues had been found in their favor at the trial before Lord Lyndhurst, and as the judges in the Court of Exchequer Chamber were of opinion that \*there was nothing in the [\*54] partnership deed which indicated any intention to carry on the business in contravention of the acts of Parliament, and that the contract between the parties was consequently, for anything that appeared upon the face of the deed, a valid contract, the plaintiffs in the cross suit were now entitled to a declaration in the affirmative of both issues; namely, that Warner was legally to be considered as a partner of Armstrong, and entitled to receive payment at the rate of 10 per cent. on the capital advanced by him; and secondly, that his representatives were entitled to receive such payment on the sum of 4,300*l*. Lord Denman, indeed, who pronounced the judgment of the Court of Exchequer Chamber, had intimated that it was the general opinion of the court, that if there had been a collateral agreement proved to carry on the trade in violation of the acts of Parliament, that agreement would be void. But no such collateral agreement had been proved, nor was it even alleged by the plaintiffs in the original bill, that such a collateral agreement existed. The plaintiffs in the cross bill, therefore, being the successful parties upon the trial of the issues, and upon the hear-

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ing of the bill of exceptions, were entitled to a decree in their favor.

Mr. Bickersteth, Mr. Pemberton, Mr. Lovat and Mr. Cooper, *contra*:—The judgment of the Court of Exchequer Chamber, proceeded partly, if not principally, upon a technical ground which could not affect the rights of the parties in this court, even if the whole proceeding by way of bill of exceptions had not been pronounced irregular by this court, and only by indulgence permitted to be carried to a hearing. The judgment, so far as it touched the merits of the case, is substantially in favor of the plaintiffs in the original suit, but, if that were otherwise, [\*55] \*the right of the plaintiffs in the original bill to call upon this court for a new trial of the issues, on the ground of the misdirection of the judge, is as open to them as ever. The question directed to be tried by the first of these issues, was whether there really was a *bona fide* partnership subsisting between Warner and Armstrong at the time of Armstrong's death; and whether the deed, purporting to be a partnership deed, was not a mere colorable instrument to cover an usurious transaction, by which Warner was to receive interest at 10 per cent. for his advances. If there were no *bona fide* partnership subsisting between Warner and Armstrong, there was an end to the whole question, for the second issue merely directed an inquiry as to the amount of Warner's claim, supposing such partnership to have existed. The conduct of the parties during the lives of Armstrong and Warner, and Warner's will, in which he evidently considered himself an ordinary creditor upon the estate of Armstrong for the amount of his advances, show that the deed was a mere colorable instrument, and that there was no *bona fide* partnership—not even a secret partnership—subsisting between Warner and Armstrong. But, if a partnership did exist, then it cannot be denied, nor has it ever been denied, for the whole evidence on both sides demonstrates, that Warner was a secret or dormant partner; and a secret or dormant partnership in the trade of a pawnbroker, is contrary to the acts of Parliament regulating that trade, and consequently illegal.

Those acts of Parliament, and the several provisions in them, which must necessarily be violated, if the trade of a pawnbroker could be carried on by two persons, one of whom was a secret or dormant partner, were undoubtedly framed for the protection of the public, and not, as was stated by Lord Lyndhurst [\*56] in his direction to \*the jury at the trial of the issues, for mere fiscal purposes, so that a breach of the regulations required by them would be satisfied by a submission to the penalties imposed, and would not extend to invalidate any contract involving such breach. The 1 Jac. I, c. 21, after reciting that

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counterfeit brokers and pawnbrokers upon usury, had grown to many hundreds in London and other places, and the greater opportunities which were thereby given to the utterance, selling, and pawning of stolen goods, proceeds to make provisions for the remedy of such mischiefs; and the 30 G. II, c. 24, contains further provisions for preventing the unlawful pawning of goods. By the 25 G. III, c. 48, pawnbrokers are required to take out annual licenses under a penalty of 50*l.*, and that act was followed by the 36 G. III, c. 87, and by the 39 & 40 G. III, c. 93, which embodies the provisions of the former acts, and introduces many additional regulations. By the sixth section of this act, the pawnbroker is required to give to the party pledging goods, a note in writing, describing the goods, on which note are to be written or printed the name and place of abode of the pawnbroker giving the same. By the thirteenth section, provision is made for the search of the premises of pawnbrokers, where goods have been unlawfully pawned; and the twenty-third section enacts, "for the better manifesting, by whom the trade or business of a pawnbroker shall hereafter be carried on, that all and every such person or persons, who shall follow or carry on such trade, shall cause to be painted or written in large legible characters over the door of each shop or other place by him, her, or them, respectively made use of for carrying on that trade or business, the Christian and surname or names of the person or persons, so carrying on the said trade or business, and the word 'pawnbroker' or 'pawnbrokers,' as the case may be, under a penalty of 10*l.*." Now all these regulations \*are plain- [\*57] ly incompatible with the valid existence of a secret partnership; and, indeed, the very object of the last-mentioned section would seem to be to prevent a secret partner from engaging in the trade. To what end has the legislature taken all these precautions for securing the publicity with which the business of a pawnbroker shall be carried on, for protecting the public generally against the facilities which this business affords for the commission of offences, and also for protecting that portion of the public whose necessities compel them to resort to pawnbrokers; if a wealthy capitalist, whose name is concealed, may furnish the means of carrying on the business, while he himself keeps securely in the back ground, free from all the salutary restraints which the legislature has imposed upon the trade for the benefit of the public, and shifting all the responsibility upon some needy agent, who is content, for a small per centage upon the profits, to act the part of the ostensible pawnbroker? It is said, that for anything that appears upon the face of the agreement, Warner might have complied with all these regulations. But did he in point of fact comply with them? Did his name appear in the license annually taken out? Were his name and

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place of abode written upon the notes given to persons pledging goods? and was his name painted over the door, as required by the act? This is not pretended; the case made by the other side, as well as by us, is, that if he was a partner at all, he was a dormant partner; and unless the regulations in the pawnbroker's acts are to be treated as mere fiscal enactments, to be broken at pleasure by a party who is ready to pay the penalty for their violation, and nugatory so far as their effect upon contracts is concerned, no man can legally be a dormant partner in the business of a pawnbroker.

[\*58] \*This is in effect the conclusion to which the Court of

Exchequer may be presumed to have come; for Lord Denman, in delivering the judgment of that court, says, that "it is clearly no part of the written agreement to contravene the acts of Parliament, because the words 'secret' or 'suppressed' are nowhere used in that agreement." This observation implies that a secret partnership in the business of a pawnbroker would, in the opinion of the court, contravene the acts of Parliament; and supposing the object of the parties to the agreement to be that of disguising a collateral unlawful agreement for a secret partnership, by a colorable contract for a lawful partnership, it is obvious that they would not frame their agreement in language which would at once render it unlawful, and proclaim to all the world their intention of contravening the acts of Parliament. It is not surprising, therefore, that the deed contains no such words as "secret" or "suppressed," nor anything equivalent to an open declaration of their intention to carry on the pawnbroking business in an unlawful manner; the marvel would have been, if it had contained any such open avowal of their unlawful intentions. But the whole subsequent conduct of the parties proves their unlawful intentions; and if an agreement for a secret partnership in the pawnbroking business is illegal, which, in the judgment delivered by Lord Denman, appears to be conceded, *a fortiori* must the actual carrying on of the business of a pawnbroker, or the actual participation in it as a secret partner, which is the foundation of the claim made by the plaintiffs in the cross bill, be illegal. Whether the deed be, upon the face of it, legal or not, is immaterial, if the acts of the parties were such as show that the deed was framed for an illegal purpose; and the whole conduct of Warner, during the period of the alleged partnership,

was that of a person who was either not a partner, or de-  
 [\*59] termined \*to furnish no evidence of his being one. In either case the contract was unlawful and void.

The whole case resolves itself into a question, upon which it would be useless for the court to direct an issue because the facts are not and cannot be disputed, namely, was Warner an open or a secret partner? If Warner was a secret partner, there

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is no legal foundation for his claim, and we submit, therefore, that the bill revived by his representatives ought to be dismissed, without sending this case back to a jury; but if there remain any doubt as to the question directed to be tried by the former issues, the plaintiffs in the original bill are at least entitled to a new trial of those issues, and to such further or other inquiries as the court may think fit to direct, for the purpose of putting more distinctly in issue the real question on which the case hinges.

Mr. *Tinney*, in reply, contended that the regulations in the acts of Parliament, which were relied upon by the other side, applied only to persons actively and ostensibly engaged in the trade of a pawnbroker, and not to dormant partners, who might as lawfully engage in that as in any other trade. If the original contract of partnership were legal—and it was declared to be so by the judges of the Court of Exchequer Chamber—it could not be rendered illegal by any subsequent breach of the regulations enacted by the pawnbrokers' acts. No direct opinion was given by the judges as to the effect of an agreement for a partnership in the business of a pawnbroker, in which one of the parties to the agreement was to be a dormant partner; for that question was not in issue. All that Lord Denman said was, that the judges were unanimously of opinion that an agreement to carry on the business of a pawnbroker in violation of the acts of Parliament would be illegal and \*void, of which there [\*60] could be no doubt; but the question whether it was a violation of the acts of Parliament for one of two persons, who had entered into a legal contract of partnership in the pawnbroking business, to abstain from taking any active or ostensible part in such business, remained entirely open and untouched by that opinion of the judges. *Gilpin v. Enderbey*(a) was a case very similar to the present in its circumstances, and a strong authority in favor of the plaintiffs in the cross suit. In that case Enderbey and Gilpin entered into a contract, by which Enderbey agreed to advance a sum of 20,000*l.* to Gilpin, to be employed by Gilpin in his business of an army clothier, without the interference of Enderbey; and Enderbey agreed, without reference to profit or loss, to pay to Gilpin 2,000*l.* a year for ten years, and at the end of that time to repay him the 20,000*l.* out of the profits, if they were sufficient, and if not, out of the capital. The deed was impeached by Gilpin as having been executed by way of shift upon an usurious consideration. The jury found a verdict for the defendant Enderbey, and judgment was given for him in the Court of Common Pleas; and upon the cause being

(a) 5 B. and Ald. 954.

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removed to the Court of King's Bench in error, it was held by that court, that after the finding of the jury the deed must be taken to disclose the real intention of the parties, and that it would not in that case be void on the ground of usury. Lord Tenterden, in delivering the judgment of the court, said, "If the deed discloses the facts of the case, and the intention of the parties, this is not the case of a loan of money by Enderbey to Gilpin, but a contract of partnership between them of a peculiar kind. If the deed does not disclose the real facts and the intention of the parties, but was executed only as a contri-  
 [\*61] vance to cover a loan of 20,000*l.* for \*ten years at 10 per cent., the deed was void. But this is a fact which ought to have been found distinctly by a jury to enable the court to declare the deed void. No such fact has been found, and, in the absence of such finding, we must consider the deed as speaking the language of truth." The principle upon which this case was decided, is precisely applicable to the present case. The deed of the 24th of June, 1810, is upon the face of it legal; no fact has been proved to impeach it, and, in the absence of any such fact, fraud cannot be presumed, but the deed must be taken to speak the language of truth.

In *Fereday v. Horden*,<sup>(a)</sup> where a similar contract was entered into between three parties, and a fourth person, who was to receive for a term of years a clear annual sum upon the capital which he advanced to the concern at the rate of between 7 and 8 per cent., the three parties continuing to carry on the concern in their own names and under their own responsibility, it was held that the contract was not usurious, and that, though the person let into the concern was under no liability as between himself and the plaintiffs, yet he was liable for all the debts of the concern, as to the rest of the world.

THE MASTER OF THE ROLLS:—It does not appear to me to be necessary to make any observation upon what passed in the Court of Exchequer on the trial of the issues, or to make any observation upon the judgment delivered by the Court of Exchequer Chamber, further than to state that it was clearly the opinion of that court, that if, at the execution of the  
 [\*62] \*deed of June, 1810, it was understood and agreed between the parties to that deed that Warner should be a secret and dormant partner, and that his name should not appear in the business, no legal partnership was constituted between Armstrong and Warner.

It is truly stated that the fact has not hitherto been found that there were, at the time of the execution of the deed of June,



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1810, such understanding and agreement between the parties that Warner should be a secret partner. The only question now is, whether I shall send it to a jury to inquire into that fact, or whether, upon the whole matter which is properly before me, I shall now determine upon that fact without the assistance of a jury. I am of opinion, that, upon the whole evidence in the cause, it is clear that there existed an understanding and agreement between the parties at the time of the execution of the deed of June, 1810, and that Warner, if a partner at all, was intended to be a secret partner; and I entirely concur in the opinion delivered in the Exchequer Chamber that, assuming such fact, no legal partnership was constituted between Armstrong and Warner.

The cross bill must therefore be dismissed, and, the claim of Warner not being founded *bona fide*, must be dismissed with costs.

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In the bill filed by the children of Robert Armstrong, Warner having by his answer repudiated the character of trustee under the instrument of the 28th of April, 1819, which was afterwards proved as a testamentary paper, and it being in evidence that Warner had declined to interfere in the taking of the stock after Armstrong's decease, on the ground of his being a trustee \*under that instrument, and that he had received from [\*63] Armstrong's bankers, in his character of trustee, a small balance due to Armstrong's estate, the Master of the Rolls was of opinion that Warner's representatives were bound to pay the costs of this suit, so far as they were occasioned by Warner's claim to be a partner in the business carried on by Armstrong.

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*November 14th and 15th.*—The representatives of Warner presented a petition of rehearing, and the case was again fully argued before the Lord Chancellor by Mr. *Knight*, Mr. *Tinney* and Mr. *Wakefield* for the appellants; and by Sir *Edward Sugden*, Mr. *Lovat* and Mr. *Cooper*, in support of the decision of the Master of the Rolls.

For the appellants, in addition to arguments similar to those which had been urged on their behalf in the court below, it was insisted that the proceedings at law, and on the case coming back to the court below upon the equity reserved, had been altogether irregular and anomalous. The bill of exceptions had been decided by the Master of the Rolls to be irregular upon the trial of an issue directed by a court of equity, and ought never, therefore, to have been brought to a hearing before the Court of Exchequer Chamber. The judgment of the Court of Exchequer Chamber was against the plaintiffs in the original suit, and taking the observations made incidentally by Lord Denman upon de-

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livering the judgment of the court in the sense least favorable to the plaintiffs in the cross bill, the utmost the other side could be entitled to was a new trial of the issues. But instead of granting a new trial of the issues, the Master of the Rolls at once decided against the parties in whose favor both issues had been found ; a proceeding for which there was no precedent. Nor

[\*64] \*was that all, for his Honor went on not only to make the successful parties pay the costs of their own suit, but to make them pay part of the costs in the suit brought by the unsuccessful parties.

*November 21st.*—THE LORD CHANCELLOR :—If a person agrees with another to be a secret partner in the business of a pawn-broker, he agrees to do that which is illegal and punishable by the 39 & 40 G. III, c. 99, an act containing provisions highly beneficial, and bringing the trade in question under regulations which are wholesome to the community, inasmuch as they prevent the abuse of such traffic ; regulations which will never be objected to by the respectable part of the body concerned in carrying the trade on, and which only affect those whom the police ought to watch over. Any agreement of this sort, therefore, is unlawful ; can convey no rights in any court to either party, and will not be enforced by decisions at law or by decree here in favor of one against the other of persons equally culpable.

If, as in the present instance, we have before us a contract of partnership wholly silent upon the statutory obligation to make the names public over the door, we have no right to argue from the omission that an infraction of the law was intended ; on the contrary, we are rather bound to believe that the compliance with the law, being taken for granted as a matter of course, was not expressly mentioned in the articles, as being thought superfluous.

If, again, such a contract, legal in itself, has been made, nothing done afterwards, how illegal soever, can operate to make

[\*65] the contract unlawful. But where \*the acting of the parties is illegal ; where, the contract being silent, the law is broken under it, though not by force of it, there arises a very natural suspicion that the written articles, though true as far as they go, do not contain the whole truth, and that another agreement was entered into, collateral to the one in writing, and to which the illegal acting may be referred.

Then, if such an agreement shall appear from all the circumstances plainly to have subsisted, the inference is irresistible, that the two, the written and the unwritten, must be taken together in order to get at what the true contract between the parties was. For this is not the case of two independent contracts between the same parties touching the same thing. The nature

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of the transaction prescribes silence as to some parts of it which will not bear the light, while the innocent and producible portion is reduced to writing. Hence the two must be taken as one contract, the production of one and suppression of the other portion being easily explained.

Although it is vain to deny that there have been somewhat unusual proceedings in certain parts of the present cause, and though considerable error appears to have prevailed in several stages of the proceedings, including those at *Nisi Prius*, yet taking the mere facts into consideration, it would be difficult to figure a case which leaves less room for doubt. No man can so far abstract himself from his common feelings, so far shut his eyes to the plainest indications of common sense, as to hesitate one instant in what light he shall regard the transaction between Messrs. Armstrong and Warner. To call it a partnership at all is incorrect, indeed is an abuse of terms. It was a loan transaction much rather than a partnership; but to escape the usury laws, and obtain relief here, the \*party must treat [\*66] it as partnership. Money is advanced, large interest is stipulated for under the name of share of profits, but a share fixed at, not under 10 per cent., and the party advancing the money treats his partnership deed exactly as a security for the loan, both in transactions *inter vivos*, and when he comes to make his will. Then the ostensible party deals with the house, lease, insurer's right to policy money in case of fire, and, in short, the whole business as his own, and as a concern in which the other never interferes. But take it as a partnership, the whole of these dealings, and a variety of other circumstances, show that Warner was a concealed partner purposely, and not from any accidental omission to comply with the statutory requisition in respect to making his name public on the premises. Of these circumstances, his attending with other friends and pawnbrokers at the periodical stock-takings, and on one occasion actually signing with others the account of Armstrong's stock in trade, is perhaps the most remarkable.

The question is, whether or not any man of plain and ordinary understanding, can hesitate a moment how he shall explain all this, and to what contract, if partnership there be in the matter, all this acting shall be referred? There were times when courts of justice took a delight in vain subtleties and absurd refinements, as if their duty ever was, what certainly was their frequent object, rather to show their ingenuity than to get at the truth, and to astonish ordinary minds by coming at unexpected conclusions, founded on bare possibilities, rather than satisfy the justice of the case, by deciding as all mankind be sides would decide undoubtingly. Those were the times when the most ordinary actions of men were wrested to humor infer-

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1834.—*Armstrong v. Armstrong*.—*Lewis v. Armstrong*.

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ences hardly rational, though not absolutely impossible, and when the words of men were tortured and made to bear [\*67] the meaning, \*most remote from the real truth. Happily we have outlived those follies, the pride of the older times, and the remains of the dark scholastic ages. Judges are now content to see things as ordinary men do, and, when facts come before them, to draw from them the inferences as to conduct which a jury would clearly deduce. To the facts in this case I cannot shut my eyes, nor can I avoid the conclusions to which I know as certainly that any jury must come, to whom they might be submitted by an issue, as I know that I sit here. A secret understanding, amounting to a collateral agreement, subsisted between the parties, in execution of which it was that Warner was, if a partner at all, a dormant or secret partner, nay, a partner concealed, and not merely dormant; carefully, designedly, craftily concealed, breaking the statutory provisions, not so much by non-feasance or mere omission, as by a course of cunning contrivance. The existence of both agreements, the open and the secret, is clear, and they were parts of one contract, wholly illegal.

The law, as laid down by the learned judges in the Exchequer Chamber upon a question which happened to be raised, but which no one in this case had, as I conceive, any interest in raising, I most implicitly subscribe to, as I do to the suggestion which is given near the end of the judgment, and on which I proceed in the manner wherein I have applied the principle above stated.

Nothing done by the Master of the Rolls below at all questions that law. But it is impossible to avoid regretting that the issues were so framed as to produce confusion: a distinct issue to try the fact, first, partnership or no partnership; secondly, the concealment of Warner's name, if there was partnership; and, [\*68] \*thirdly, and chiefly, the subsistence of an agreement collateral to the one in writing; in other words, whether or not the concealment was part of the same contract of partnership under which the party claimed his share; these issues never could have led to confusion.

If it be said that the law remained to be settled, it is to be considered that a party ought not to pay the costs of a miscarriage in settling it, and incident to the manner in which the issues were framed. Here it has certainly, though unfortunately, happened, that the case came back with no light whatever thrown by the jury on the question of fact, and with an opinion given by the judges upon two points of law, one of which was attended with doubt and difficulty, and was not necessary to the decision of the suit here; and the other, which alone was necessary, was so clear, that it amounted almost to a self evident

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proposition. Some of this confusion arose at *Nisi Prius*. But I feel so strongly that the manner directing the issues was the original cause of the greater part of it, that I think the costs of the issues should not be thrown on the plaintiff in the cross cause. I affirm the decree with that exception, and give no costs here.

\**LEWIS v. ARMSTRONG.*

[\*69]

**ROLLS.**—1835: 3d and 5th November.

A party gave notice of a motion and died before the motion was heard, and the suit was revived by his executors, who declined to proceed with the motion. The bill revived by the executors was dismissed with costs. The costs of the abandoned motion are not costs in the cause.

IN the suit of *Warner v. Armstrong*,<sup>(a)</sup> the plaintiff, on the 20th of January, 1829, gave notice to the defendants that the court would be moved for a receiver of the alleged partnership stock, and an injunction to restrain Betty Armstrong from selling or disposing of any part thereof. Affidavits of great length were filed by the defendants, but before the motion was heard, Warner died; and upon the suit being revived by his executors, the defendants gave notice to the plaintiffs in the revived suit to proceed with the motion, or that the defendants would apply to the court for the costs thereof as for the costs of an abandoned motion. The executors declined to proceed with the motion, and the defendants, on the 21st of February, 1831, made an application to the Vice-Chancellor for the costs, as of an abandoned motion;<sup>(b)</sup> but the Vice-Chancellor refused to make any order thereupon.

The bill revived by the executors of Warner having been dismissed with costs, the Master, in taxing the costs disallowed to the defendants the costs incurred by them in relation to, or in consequence of the motion not proceeded with by the executors of Warner; and the defendants now presented a petition, praying that they might be at liberty to except to the Master's certificate, or that it might be referred back to the Master to review his taxation.

Mr. *Bickersteth* and Mr. *Cooper*, for the petitioners.

\*Mr. *Tinney* and Mr. *K. Parker*, *contra*.

[\*70]

For the petitioners it was contended, that the dismissal of the bill with costs involved the costs of all interlocutory proceedings

(a) See the preceding case.

(b) 1 Sim. 240.

1834.—Child v. Giblett.

in the cause which had not been provided for, and, consequently, the costs occasioned by the abandoned motion. The case of the petitioners, though not strictly within the terms of Lord Eldon's order of the 5th of August, 1818, which applied only to parties fell within the mischief intended to be remedied by that order.(a)

On the other side it was said, that interlocutory proceedings were not proceedings in a cause, nor the subject of a bill of revivor. This was not a question of abandoned motion, for the party who gave the original notice of motion was dead, and the suit in which the notice was given had consequently abated. As to the motion before the Vice-Chancellor, it had been decided that the costs of a motion dismissed were not costs in the cause: *White v. Lisle*.(b)

The MASTER OF THE ROLLS(c) being of opinion that the present case was unprovided for by Lord Eldon's order of the 5th of August, 1818, directed a reference to the six clerks, to ascertain whether, previously to that order, the costs of an abandoned motion were considered as costs in the cause; and upon those officers having certified, on the following day, their unanimous opinion that they were not, the petition was dismissed with costs.

(a) 1 Swanst. 128.

(c) Sir C. Pepya.

(b) 4 Madd. 226.

[\*71]

\*CHILD v. GIBLETT.

ROLLS.—1834: 15th January.

Bequest of residue to the testator's daughters A. and B. in equal proportions; and in case of the death of either, the whole to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years; but if not, then among the children of C.

A. and B. survived the testator; and A., who died without having been married, bequeathed the whole of her property to B.: Held, that the bequest did not become absolutely vested in A. and B. on the death of the testator, but continued subject to the executory bequest over in favor of C.

THE residuary clause of the will of John Child was in the following words: "I give and bequeath my household furniture, plate, linen, china and wearing apparel, and all other the residue of my estate and effects, to Paul Giblett and Benjamin Brecknell, upon trust, in the first place, to pay all my just debts, and after payment thereof, to divide the same between my two daughters Selina Child and Elizabeth Child, share and share alike, to whom I give and bequeath the same in equal proportions; and in case of the death of either, I give the whole thereof to the survivor

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of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they shall attain the age of twenty-one years; but if not, then among the children of Paul Giblett, share and share alike, and if only one child, then the whole thereof to that one child." And the testator appointed Paul Giblett and Benjamin Brecknell executors of his will.

The testator died in the year 1803, leaving the two daughters mentioned in the will (who had then both attained the age of twenty-one) surviving him. Elizabeth Child died on the 28th of November, 1824, without having been married, and having made a will, by which she gave the whole of her property to the plaintiff, Selina Child, whom she appointed her sole executrix. The plaintiff proved the will of her deceased sister; and the present bill was filed by her against the surviving executor and \*the representatives of Brecknell, the deceased [\*72] executor, and against the children of Paul Giblett; and the question was, whether the plaintiff was entitled to an absolute interest in the residuary property of the testator, or only to an interest for life under the testator's will.

Mr. *Bickersteth* and Mr. *Kindersley*, for the plaintiff:—Where a testator gives a legacy to A., and, in case of the death of A., to another person, the authorities have settled, that he must be understood to mean the contingency of the death of A. in his lifetime; for the death of A., at some time or other, is an event which must happen, and cannot be taken to be the event in the contemplation of the testator. If A. survives the testator, therefore, he will take absolutely; and so, if legacies be given to A. and B. respectively, and, in case of the death of either of them, the share of the legatee dying to the survivor, if A. and B. both survive the testator, they will take absolutely: *Lowfield v. Stoneham*,<sup>(a)</sup> *Hinckley v. Simmons*,<sup>(b)</sup> *Cambridge v. Rous*.<sup>(c)</sup> The same rule of construction was followed in *Slade v. Milner*.<sup>(d)</sup> where there was a bequest of stock to A., and, in case of her death, the stock was directed to be equally divided among her children. There the court held, that the words "in case of her death" were to be restricted to a dying in the lifetime of the testator, and that A., having survived the testator, took absolutely.

In this will the testator first gives his residuary property to his two daughters, in words which make them tenants in common; but he proceeds to say, that "in case of the death of either, he gives the whole thereof to \*the survivor of [\*73] them." Here he must be taken to mean, according to the

(a) 2 Str. 1261.

(c) 8 Ves. 12.

(b) 4 Ves. 160.

(d) 4 Madd. 144; and see *Home v. Pillans*, 2 Mylne & Keen, 15.

1834.—Child v. Giblett.

only rule of construction which gives a sensible meaning to the words, "in case of the death of either of them in my lifetime." He goes on to provide for two other contingencies, namely, their marrying and having children, and those children dying before twenty-one. These contingencies are plainly to be connected with the previous contingency of a dying in the testator's lifetime, and the whole is to be read as one sentence. Thus, if one of the daughters die in the testator's lifetime without children, then the whole is to vest absolutely in the surviving daughter at the testator's decease; but if they or either of them die in his lifetime, leaving children, then the property is to go to such children if they attain twenty-one; and it is only in the event of such children not attaining twenty-one that the bequest over to the children of Paul Giblett is to take effect. If this be the true construction of the will, the two daughters of the testator, being unmarried at the testator's death, took, each of them, an absolute interest in a moiety of the residuary property, and the executory bequest in favor of the children of Paul Giblett could never take effect. The deceased sister having bequeathed to the plaintiff the whole of her property, the plaintiff is now absolutely entitled to her sister's moiety of the testator's residuary property, as well as to her own.

Mr. *Stuart* for the children of Paul Giblett:—It is a forced and unnatural construction of this will, to impute to the testator the intention of confining to his own lifetime the provision he has made for the contingencies of his daughters marrying and having children, who should not live to attain the age of twenty-one. The testator plainly intended to point out the persons [\*74] sons \*to whom his residuary estate was to go, whenever those events should happen. The general rule, which restricts the words "in case of the death" of a legatee to a dying in the lifetime of the testator, ceases to be applicable, if it appears from other parts of the will that it is inconsistent with the intention of the testator. In *Lord Douglas v. Chalmer*,<sup>(a)</sup> where there was a bequest of the residue to the use and behoof of Lady Douglas, and in case of her decease, to the use and behoof of her children, share and share alike, the court held that the words "in case of her decease," referred to her decease at any time, and that consequently, Lady Douglas was entitled only to an estate for life, the children taking a vested interest in the capital. In *Billings v. Santlom*,<sup>(b)</sup> and in *Nowlan v. Nelligan*,<sup>(c)</sup> it was held, that to give effect to the intention of the testator, the words "in case of the death" must be construed, "upon, or at the death"

(a) 2 Ves. jun. 501.

(b) 1 Bro. C. C. 393.

(c) 1 Bro. C. C. 489.



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of the legatee. Now, in this case, there can be no doubt of the intention of the testator; he clearly intended to provide for the children of his daughters if they should have any—whether in his lifetime, or at any subsequent period, is perfectly immaterial; and to give such children an absolute interest in his residuary property. It is equally clear, that the testator intended to make the children of Paul Giblett the ultimate objects of his bounty, if his daughters should have no children that should attain twenty-one, or, which is the same thing, if they should die without having been married; for in either case, the condition upon which the executory bequest is to take effect is equally answered. *Jones v. Westcomb*, (a) *Murray v. Jones*. (b) These dispositions \*of the testator's residuary property in favor of [\*75] grandchildren, and ultimately in favor of the children of Paul Giblett, are inconsistent with the intention of giving more than a life interest to his daughters.

Mr. *Bickersteth*, in reply :—The testator having, by expressions the legal effect of which cannot be disputed, directed a division, in the event which has happened, at his death, the contingencies afterwards mentioned, must be contingencies which were to happen in his lifetime. This is a more obvious and natural interpretation of the testator's intention, than the construction contended for on the other side, which is founded upon the supposition, that the testator meant to contradict himself, and render nugatory the provision he had made for the absolute division of his property between his daughters. In *Lord Douglas v. Chalmer*, the construction put by Lord Alvanley upon the words "in case of her decease," was inconsistent with the current of authorities, and with the subsequent case of *Hinckley v. Simmons*, where the same judge put the usual construction upon the same words.

THE MASTER OF THE ROLLS :—The rule is, that where there is a bequest to two persons, and in case of the death of one of them, to the survivor, the words "in case of the death" are to be restricted to the life of the testator; but the question is, whether the first expression used by this testator, to which this rule would apply, is not qualified by the subsequent words of the will. The testator cannot possibly have intended that the children of Paul Giblett should take in the event of a marriage of his daughters, and their death without children in his lifetime, and \*that they should not take in the event of a marriage [\*76] of his daughters, and their dying without children after his decease. That would not be a rational distinction. I am of opinion, therefore, that the general rule is here qualified by the

(a) Pr. in Ch. 316.

(b) 2 V. &amp; B. 313.

1834.—Clifton v. Cockburn.

subsequent words used by the testator; and that in the event of the plaintiff dying without children, or if she should have children, and none of them live to attain the age of twenty-one, the children of Paul Giblett will be entitled to the residuary property of the testator.

## CLIFTON v. COCKBURN.

1834: 26th and 28th February; 1st and 8th March.

Construction of a clause in a marriage settlement.

A court of equity will not direct payments made under a mistaken construction of a doubtful clause in a settlement to be refunded, after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction.

THIS was an appeal on the part of the defendants against the decree of Sir. J. Leach, Master of the Rolls, in so far as it was not thereby declared, that Dame Eliza Cockburn, deceased, was, according to the true construction of the settlement of the 1st of January, 1791, entitled to the interest which accrued due on the clear residue of the respective estates of Charles Rumley and Dr. Davis, from the date of that settlement till the time when the plaintiff came of age; and in so far as it was not also thereby declared, that so much Carnatic stock and money as had been transferred or paid to the plaintiff and his trustees, in respect of the estate of Dr. Davis, over and above what they were entitled to, according to such construction, ought to be set off against the Carnatic stock and money to which they were entitled in respect of Major Rumley's estate.

The questions discussed on the appeal, were principally two: first, whether his Honor rightly decided, that upon the true construction of the settlement of the 1st of January, 1791, [\*77] \*the plaintiff was entitled to the interest which had accrued due on the clear residue of the estates of Dr. Davis and Major Rumley, during the interval between the execution of that settlement, and the period of the plaintiff's majority; secondly, supposing his Honor's decision to have been erroneous in that point, whether under the peculiar circumstances of the case, and after the death of Lady Cockburn, by whose directions the settlement had been framed, and who, during the whole of her subsequent life, had recognized and acted upon the construction which the Master of the Rolls considered to be the true one, the court was now at liberty to adopt and give effect to a different construction, by allowing the sums, which, under the common mistake of all parties, had been paid to the plaintiff in respect of the minority interests, to be deducted from the moneys which were still owing

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to him in respect of Major Rumley's estate, and of which it was the object of his bill to obtain an account and payment.

The argument on the first point consisted entirely of a critical examination of the language and provisions of the settlement executed by Lady Cockburn on the 1st of January, 1791, in contemplation of her marriage with Sir William, then Captain Cockburn. With a view to throw light upon the question of construction, reference was made on both sides to that class of cases in which the court had been called upon to consider under what circumstances, and to what extent, a person having only a temporary or partial interest in a fund had a right to make it effectual as against the parties entitled to the capital, while the capital itself remained unrealized and unproductive. Upon this point the following authorities were cited: *Garth v. Cotton*, (a) *Hutcheon v. Mannington* (b) *Gaskell v. Harman*, (c) *Sirwell v. Bernard*, (d) *Wood v. Penoyre*, (e) *Walker v. Shore*, (g) *Earl of Stair v. Macgill*, (h) *Bernard v. Montague*, (i) *Taylor v. Hibbert*, (k) *Stott v. Hollingworth*, (l) *Fitzgerald v. Jervoise*, (m) *Angerstein v. Martin*, (n) *Hewitt v. Morris*, (o) *Kilvington v. Gray*, (p) *Law v. Thompson*. (q) On the second point the following cases were referred to and commented upon: *Pullen v. Ready*, (r) *Nicholls v. Leeson*, (s) *Currie v. Gould*, (t) *Skyring v. Greenwood*, (u) *Mosely v. Jackson* (not reported) before Sir J. Leach, when Vice-Chancellor, and affirmed by Lord Lyndhurst on appeal.

The history of the peculiar circumstances and transactions, out of which the questions in the cause arose, is fully detailed in the Lord Chancellor's judgment, where the material passages in the settlement are also stated.

Sir E. Sugden, Mr. Tinney, and Mr. Garratt, in support of the appeal.

Mr. Knight, Mr. Wigram, and Mr. Richards, *contra*.

March 8th.—The LORD CHANCELLOR delivered the following judgment:—\*Dame Elizabeth Cockburn had [\*79] been twice married in the East Indies before her union with Sir William Cockburn, her surviving husband, and one of

- (a) 1 Dick. 183.
- (b) 1 Ves. jun. 366.
- (c) 6 Ves. 159.
- (d) 6 Ves. 520.
- (e) 13 Ves. 325.
- (g) 19 Ves. 387.
- (h) 1 Bligh, (N. S.) 662.
- (i) 1 Mer. 422.
- (j) 1 Jac. & W. 308.
- (k) 3 Mad. 161.

- (m) 5 Mad. 25.
- (n) T. & R. 232.
- (o) T. & R. 241.
- (p) 2 Sim. & S. 396.
- (q) 1 Russ. 92.
- (r) 2 Atk. 587.
- (s) 3 Atk. 573.
- (t) 2 Mad. 163.
- (u) 4 Barn. & C. 281.

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the defendants in this suit. By her first husband, Mr. George Clifton, she had two children, Frances, who died under age, and Charles Claude, the present plaintiff. During her first marriage, Major Rumley, an intimate friend of her family, deposited with her a sealed packet upon his departure to the war then waged against Hyder Ali; and, being taken prisoner, perished, with many other gallant and unfortunate men, in the dungeons of that barbarous tyrant. Before his death he found means to communicate, by writing to Mrs. Clifton, his desire that she should open the packet, which she did, and found it to contain his will, and a bond for 31,500 star pagodas from Omdut ul Omrah, then heir apparent of the Nabob of Arcot, and who afterwards succeeded his father, Wallah Jah, upon the throne of the Carnatic. The bond was to secure a debt from the Omrah; but Major Rumley had taken the precaution of making Mrs. Clifton the obligee, as he intended the sum should be paid to her, whom he also left executrix and residuary legatee in his will. It is admitted, however, that she took a beneficial interest in the bond only under the will.

After the decease of her first husband, she intermarried with Dr. Davis, resident physician at the court of Arcot, and who also was to a considerable amount a creditor of the nabob; as, indeed, every one appears speedily to have become who got within the vicinage of his Highness, described, and justly described, by a great orator of that age, (a) as a known and established [\*80] bond seller, "keeping himself the largest bond warehouse in the world."

By this second marriage there was no family, and Mrs. Davis, possessed of the fortune which she derived under Major Rumley's will, and of that which she took under Dr. Davis' bequest, contracted a third marriage, in the beginning of the year 1791, with Captain (afterwards Sir William) Cockburn, by whom she had several children.

Before she contracted this third marriage, Lady Cockburn was naturally and very laudably desirous of making a provision for the children of the first, thus at once to protect herself from importunity, and to secure them from the effects of those new affections, and possibly those partialities, which were about to spring up. A settlement was accordingly executed, on the eve of the marriage, (on New Year's day, 1791,) of all her property derived under the wills of Major Rumley and Dr. Davis, one-half to her sole and separate use, and the other half to the two children, or the survivor, to vest in each respectively at majority or marriage; and in case of both dying under age and unmarried, then to Lady Cockburn's separate use, together with the other half; the

(a) Burke. Speech on the Nabob of Arcot's debts.

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1834.—Clifton v. Cockburn.

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interest of the children's moiety, before the principal vested, to Lady Cockburn—as one party contends—that interest before the time of vesting, as the other party maintains, to be Lady Cockburn's only in case it should, during that interval, be realized and laid out pursuant to the directions of the settlement.

At the date of this marriage Mr. Clifton was fourteen years of age, and his sister a year or two younger. She died before reaching majority; and the whole question turns upon the right to the interest on the Arcot bonds \* (which [\*81] formed the principal, if not the only, property of Lady Cockburn) for the period which elapsed between her third marriage and the year 1798, when the plaintiff, Mr. Clifton, came of age.

If the money due upon these bonds had been paid, or if in any way the fund which consisted of them had been realized and invested, so as to bear interest while Mr. Clifton was under age, no question could ever have arisen, at least upon the construction of the settlement, for it would then have been admitted on all hands that Lady Cockburn had reserved to herself the right to this interest. But many years elapsed before a prospect was opened of the bonds ever yielding anything at all; a longer period intervened before any arrangement was made for liquidating the debts which the bonds represented; and it was not till above fifteen years after the settlement, and eight years after Mr. Clifton came of age, that an arrangement made between the East India Company and the creditors of the nabob received the sanction of Parliament. Seven years more elapsed before that arrangement led to any adjudication or award by which the amount due to those entitled under the settlement could be ascertained, and by means of which they could be put in possession of any funds that were tangible or convertible into money. The award then made allotted to those claimants who had established their demands the principal sums proved by them to be due, with interest on the same, at different rates, down to the year 1804. This principal and interest were formed into one capital, and stock, called Carnatic stock, equivalent to it, was allotted; and interest from that period (1804) downwards to the date of the award in the year 1813, was also awarded in money; and the stock was to bear interest afterwards, and to be transferable. To Lady Cockburn there was \* in this way [\*82] awarded, first, on account of the bonds of Dr. Davis, 74,724*l.* Carnatic stock, and 16,094*l.* sterling for interest since the year 1804; so that the stock represented as well the original principal of the debt as its interest down to 1804; while the money represented the interest which since the year 1804 had accrued due both upon that principal and interest. Afterwards the commissioners awarded a further sum of 45,845*l.* Carnatic

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stock to her as executrix of Major Rumley; and six years after, a further sum of 7,591*l.* like stock was awarded to her in the same character.

These facts, as, indeed, most of those in the cause, are undisputed. It is equally an admitted fact, that, for many years after the award was made, the stock thus received was dealt with by Lady Cockburn, under the rights and powers of the settlement, as if she had only a title to the moiety of the principal, and to the interest upon that moiety, from the settlement of 1791 downwards; nay, even to the period of her decease, which happened in the year 1829, she took the same view of the matter, and uniformly continued to act upon this supposition.

After that event the terms of the settlement appear to have been more narrowly examined; and those entitled under her will, conceiving that the interest of the moiety settled upon Mr. Clifton, from the date of the deed till he attained majority, and, consequently, such portion of the interest awarded by the commissioners as corresponded to that interest, was reserved by Lady Cockburn under the settlement, a discussion took place between the parties, at first, as is usual, amicable enough: but, as unfortunately also is wont to happen when those discussions are protracted, it became much less friendly. Referees were named

[\*83] of the highest respectability, one of whom in this court \*we all have the happiness of knowing, and esteem accordingly; the other a distinguished officer, friendly to the family; but the parties did not think proper to comply with their recommendations, which never ripened into an award, there never, indeed, having been any formal submission. While I am very far from casting any blame for this failure upon either side, certainly not upon either in an unequal share, I must be allowed exceedingly to lament it, for the sake of the whole family, respectable in all its branches. Nothing, I am persuaded, could have given greater uneasiness to the person now removed from among them, and who appears to have so entirely engaged their affections, and to have guided their conduct, than the knowledge that their affairs were this day, and in this place, to be gazed upon by strange eyes, and discoursed of by indifferent lips; and which branch soever shall even now show a disposition to terminate these unfortunate differences, may be well assured of acting as she would have desired and counselled, and, I will add, commanded.

When the interference of common friends proved unavailing, and legal proceedings were instituted, the court before which the question was brought had two things to consider; first, the construction of the settlement, and, secondly, the proceedings of the parties, and especially of Lady Cockburn, after the funds may be said to have been realized by the award of the commissioners

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in 1813; and these are the two points which must now be considered here, when the case is brought before the court by appeal from his Honor's decree.

I. Upon the construction of the settlement, the question is, whether or not the interest of the fund secured to the children of the first marriage is reserved to \*Lady Cock- [\*84] burn during their minority. I am of opinion that it is. Differing, as I here do, with the Master of the Rolls, I should be most reluctant to express an opinion contrary to his Honor's, as I should, with great hesitation have formed such an opinion, had this been one of those cases of very involved, difficult and uncertain construction, where it is impossible to pronounce with confidence between two rival interpretations. But, in examining this instrument, I can see nothing which warrants me in considering the meaning as unattainable, or as doubtful in so extreme a degree, whether I regard the grammatical construction, the context and consequences, or the general intent. That it is quite clear, or free from doubt, I am as far from asserting; indeed, I have no right to say so after finding that two most learned and experienced judges, whom I have consulted, came to opposite conclusions upon a consideration of the instrument. This difference of opinion, and the unhesitating judgment of the court below in favor of the construction from which I dissent, would justify me in leaving this branch of the case undecided, as it is not necessary to support the general opinion to which I have come. Certainly it entitles the court to pronounce, that the construction is by no means free from difficulty and doubt. But I think I am bound to give my own view of the construction, because I have a strong opinion upon it, and the parties are entitled to know what the court thinks of the whole case.

We may begin by putting ourselves in the situation of the party making the settlement—a safe and convenient mode of dealing with all questions of construction. Lady Cockburn being about to marry again, and being desirous of providing for the two children of her former marriage, who were wholly dependent upon her, perceived of course, that she and her new husband \*must maintain and educate them during [\*85] the remaining portion of their infancy. She reckoned upon having a family by her contemplated union, and was resolved to give those two children provisions independent of herself and her husband. She knew that her only property consisted of bonds from the nabob, and that those were by no means likely speedily to be paid. Nothing could be more natural for one in such circumstances, with this knowledge, and with these views and expectations, than to settle a portion of her property upon the two children, so that they might receive it at their majority or marriage; but only giving them the capital, and reserving to

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herself the interest during the intervening period before they should be entitled to their shares. There was no reason for giving them that interest; and there was this additional reason for reserving it until they should become entitled to the principal by being of age or settled in life, that the expenses of their maintenance were to fall upon her new establishment during the interval. Let us now see whether this is not exactly what the instrument has provided.

The fund is vested in trustees in trust for herself till the marriage, "and from and immediately after the solemnization thereof, to collect and receive the said property and every part thereof." This is the primary and fundamental direction, and then follow the others: The trustees are "to invest the same (that is, the whole property) in funds or bonds of the East India Company, if realized in India; in the stocks, if realized in England, or in such other securities as Lady Cockburn shall direct;" and to pay and apply "the interest of one-half thereof to Lady Cockburn, or her attorney or assign, until the children respectively attain the age of twenty-one or be married," at which time such moiety "of the said trust property" shall be paid to [\*86] the children, or \*the survivor of them; and if both be dead, then to Lady Cockburn.

That this clause is sufficient to carry the meaning adverted to can hardly be doubted. It takes the distinction between the property or capital which is to vest at twenty-one or marriage, and the interest before it vests, which it reserves to Lady Cockburn. Whether interest shall actually have been received or not cannot signify, any more than whether the principal shall have been received or not. Although the principal remains outstanding when the period of vesting arrives, the children have a right to receive it whenever the trustees shall get it in. It is theirs from that time. In like manner, although the interest be not received before the time of vesting, the mother has a right to it whenever the trustees shall receive its arrears. It is hers up to that time.

But not only are the words sufficient to bear this, the natural meaning, and to express this, the plain and natural intention of the maker; I consider to be an obvious, perhaps the most obvious sense of the words, taken grammatically, and with a view to their collocation. The subject matter of the whole clause is "the property and every part thereof," and this is the first and governing antecedent. First, it is to be got in immediately; next, when got in, it is to be invested in securities; and then the interest of one-half of it, while the children are under age and unmarried, is to be paid to the mother, and the principal of that half to the children when of age or married. The interest of what? The principal of what? Clearly, of the property and



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every part thereof—of that capital which the whole clause is dealing with, and directing to be called in, invested, distributed—called in immediately, invested \*in securities, [\*87] distributed in moieties. The opposite construction is not even the more grammatical, to compensate for its being in so many other respects objectionable. It makes the words “one-half thereof” refer to the last antecedent; that is, not to “the said property,” as first mentioned, and “the same” as afterwards stated by way of reference, but to the funds and securities in which it shall have been invested. But though it is sufficiently correct to speak of the interest of the property, it is not so accurate to speak of the interest of government funds, or mortgages, or securities. One may speak of the interest of money or property lent on mortgage or security, or invested in the funds, but not of the interest of those funds or securities; and it is remarkable that of the four kinds of investment set forth there is only one, in bonds, to which the expression “interest thereof” can be applied with strict accuracy. To be strictly correct, then, these words must be taken to mean, the interest of the property vested in the funds or securities. But have we any right, when going upon the mere literal construction, to add such words? If, for the sake of verbal accuracy, we must import the general antecedent “property” into the body of the last antecedent, that member of the clause which mentions funds, why are we not to take that general antecedent itself as the one referred to by the words in question, “interest thereof;” and then it is gratuitous to mix up that antecedent with the part relating to investment? This becomes still clearer when we observe that the expression is, “interest of one-half thereof.” Plainly that cannot mean literally one-half of the government funds or securities, without more.

It appears, indeed, as great a strain upon the words as upon the sense, to adopt the interpretation which would connect the gift or distribution with the manner \*and time [\*88] of investment, merely because that happens to be the subject of the clause nearest in place. The capital is the subject—it is the subject of all the provisions in the clause, the thing to be realized in the first, invested in the second, distributed *quoad* principal and interest in the third. It seems a violent and capricious construction, which would raise the direction for investment into a primary object, and losing sight of the thing invested, would turn aside and begin dealing with the security in which the investment was to be made.

Further, the consequences of this construction are in no slight degree startling; they are such as cannot rationally be supposed to have been in contemplation. It would follow that the interest during minority would go different ways, and belong to dif-

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ferent parties, according to the course of events or of conduct which might retard or accelerate the realizing of the fund. That interest would belong to the child or to the mother, not according as the duration of life or of celibacy might regulate, which is the only contingency designated in the instrument, but according as the debtor was more or less solvent, the trustees more or less diligent, or the creditors more or less fortunate in obtaining payment. If the nabob could pay in three years, Lady Cockburn would receive four years' interest, (on the plaintiff's surviving and marrying after twenty-one, the event that has happened;) but if the prince deferred payment for six years, she would get but one year's interest; and if he did not pay within seven years, she would get none at all. Yet all the while interest was accruing due, though not paid; and the deed which provides for its being allotted to the mother at any rate and by both constructions in a certain event, in no event

[\*89] provides for that interest being given to the \*children.

Yet we are here asked to supply such a provision. Again, if the trustees are so active as to realize the debt and invest it in securities speedily, the mother gets the interest; if they are supine, and do not effect an investment, it goes to the children. Nay, if they sue the nabob and obtain a judgment for the principal, it will depend upon the state of business in the courts where the proceeding is had, and their swiftness in giving redress, and it may be in the Court of Error where the judgment is brought under review, whether the one party or the other shall be entitled to the fund in question. But if the debt is paid during the minority, and with interest due for any part of that minority, who can doubt that this interest goes to the mother? And yet it is not interest arising from the property vested in the funds or other securities. So that here the construction contended for on the supposed literal meaning of the words and their collocation fails entirely. To follow that out in the case now put, we are reduced to the violent conclusion that if the nabob paid principal and interest up to the last year of the minority, and the trustees had received it before that year expired, they could not pay it to the mother, who has expressly reserved it, and this in the face of the direction to pay and apply it to her, merely because they received the interest from the original debtor, and not from obligors in new securities.

Again, suppose it had been found expedient for the creditors (a very possible case) to give the nabob time, observe the position of the trustees. If they are asked by the royal debtor to let him pay the whole ten years hence, with interest up to the day of payment, they cannot accede to the request, which may be most advantageous for all the parties beneficially interested, because these will gain in very different degrees, and the one

\*will profit at the other's expense; the mother will lose, [\*90] and the children gain the minority interest. But, if they give anything less than seven year's time, then that interest will go to the mother.

I have put the cases of the principal being paid with, and without interest, and being paid before and after majority. But what if the interest is paid without the principal—a kind of bargain or compromise not irreconcilable with the character of a princely debtor, and a debt carrying interest upon the oriental scale? There really seems no possibility of giving this interest for the period of minority to the children, for there are no words which can be so tortured as to include it. All the parties claim in respect of the debts; and whatever is taken for the debts, would go to the children, *quoad* one moiety; but the interest for the period of minority is reserved to the mother, and thus, in the supposed case of compromise, there would be no principal which the composition could accompany so as to go to the children.

The context throws some doubt upon this construction, as far as the use of the word "eventual" goes. The expression occurs thrice; and the two first uses of it seem, in some inconsiderable degree, to favor the opposite construction; but the third time it is so used as exceedingly to support the interpretation to which I incline.

The clause, however, which seems expressly to provide for the case of postponed payment, throws a very strong light upon the whole argument. A power of disposition by deed or will, is reserved to Lady Cockburn over "all or any part of the said property, as well before such property shall have been realized as after." Now, if it be said, that this only gives her the power of disposing \*before it is realized, that would go [\*91] far in favor of our construction, because there is no possibility of distinguishing between principal and interest, property clearly meaning here whatever portion of the whole is reserved to her by the deed; and the preceding part had, in express terms, placed the minority interest under her sole control. But the part which immediately follows, is still stronger; for it refers to the period at which her disposition shall be binding on the trustees—"that any disposition of the property, or any part or parts thereof, under her hand, &c., shall be binding on the said trustees, as well before such property shall be received by them, as at any time after they shall have been in possession of the same." She is, therefore, invested with the power of directing, before they get it in, what they shall do with it after they receive it. Suppose she made an appointment five years before the child's majority, by this clause, the trustees are bound in terms to obey that direction, after they receive the minority interest,

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and at whatever time. The opposite construction involves this inconsistent and contradictory conclusion, that her appointment would only be binding on the trustees, provided they got in the interest within five years; although the clause contemplating postponement is quite general, and refers to no period of realizing, or rather indeed is framed upon a supposition of long postponement; with which view, and upon which recital, it proceeds to provide for filling up the place of such trustees as should quit Asia and return to their native country before the property could be realized.

This leads to a remark upon the argument drawn from the desperate state of the debt, and the prospect of its being received late, if at all. Evidence was given at length by the plaintiff to prove this fact; but it appears to me rather to oppose [\*92] than to aid his construction. \*Lady Cockburn certainly supposed that she was settling a fund of some value; if she thought it worth nothing, why make it the subject of an elaborate arrangement? The interest as well as the capital is dealt with. But to be sure, the whole complexion of the case on the evidence, as well as of the deed, construe it how we may in the disputed part, shows that no immediate payment could be expected. At some time or other, it was looked to as a provision of some value, according as the chance of the nabob's treasury being solvent was deemed more or less probable; but the expectation, though cherished, was remote. Even in those days, when the revenues of the eastern kingdoms were so lavishly squandered, those days happily gone, never to return, when Oriental munificence and European profusion, vied with each other in desolating both parts of the empire—even then the day of a possible payment, whether of principal or interest, was assumed to be distant, and the infancy of the children could only last seven or eight years. Was there, then, no meaning at all in the provision which reserved the interest during that period to the mother's sole and separate use? They who contend that she was only to have it if the fund should be realized during those few years, surely defeat their own argument, when they prove that the authors of the deed did not expect to call in the fund until after those years had elapsed.

Of the other arguments in support of the construction which I favor I shall add but one. The maintenance and education of the children, is undertaken by Lady Cockburn at all events. Is it not reasonable to suppose, that the interest of the fund belonging to those children, while thrown upon her care, is given to her in consideration of the charge thus undertaken? And is it not very unreasonable to hold that she intended to make [\*93] \*the charge certain and inevitable, and the fund for defraying it, or replacing the charge if borne and advanced

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in the first instance, uncertain and contingent? That she should take the interest at all events, and whensoever received, upon undertaking at all events the expense of their maintenance, is intelligible. That, undertaking the charge, she should provide a fund for defraying it, or for compensation, which fund should be hers or the children's, according to accidents and circumstances beyond her control, and wholly unconnected with the expenditure or its objects, appears in no small degree difficult to believe or comprehend.

The authority of decided cases is seldom calculated to throw much light upon questions of construction, so special in the circumstances in which they arise and by which they are surrounded as the present. We may, however, sometimes gather from them a few hints or analogies, or approximations to a principle. *Hutcheon v. Mannington*, decided by Lord Thurlow,<sup>(a)</sup> and still more *Sitwell v. Bernard*,<sup>(b)</sup> on which Lord Eldon appears to have bestowed great pains, and which he decided after taking the long vacation to consider it, as far as they go, support the view which I have taken of the present instrument. In the former, Lord Thurlow appears to have held that, with reference to the vesting of a right, or the party in whom it should vest, nothing can depend upon the dispatch, or slowness, or caprice of trustees in making an investment or a sale, in the case of a direction given to them which they can at any time fulfil. The latter also was the case of a direction to sell with all convenient speed. But in *Kilvington v. Gray*,<sup>(c)</sup> the direction was to purchase on certain \*terms, and in a given county; [\*94] and the present Master of the Rolls, then Vice-Chancellor, there held that this did not differ from *Sitwell v. Bernard*; and he gave the tenant for life the interest from a year after the testator's death.

I have weighed this settlement, and have given my opinion plainly upon its construction, not expressing greater doubt than I feel on it. But it would be most unbecoming to say, that I or any one can consider the point as involved in no difficulty. It is enough to know that others, to whose opinion the greatest deference is due, regarded it in a different light; enough that his Honor, in the court below, held a confident opinion of an opposite kind. That it is of doubtful import, therefore, that it is of difficult interpretation, must be assumed from the fact. That the makers of the deed themselves imposed upon it a meaning contrary to that which I am giving it—that they acted on that construction which I am treating as a misconstruction—that they knew of none other, living and dying, and making all their family

<sup>(a)</sup> 1 Ves. jun. 366.<sup>(b)</sup> 6 Ves. 520.<sup>(c)</sup> 2 Sim. & Stu. 396.

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arrangements upon the footing of it, is undeniable: and this is the next and most important light in which the case presents itself to our view.

II. Lady Cockburn survived her marriage thirty-nine years; and while it is contended, on the one hand (and it was so argued below) that a construction acted on for so long a period of time cannot now be disturbed, it is on the other, denied that any such lapse of time can be alleged, because nothing was done till the year 1813. I am of opinion, however, that the former of these positions is much more near the truth than the latter. Indeed, from the nature of the transactions, nothing was likely to be done until the funds were realized, or about to become tangible. During the earlier period, while the \*amount was as uncertain as the time of payment, there was no likelihood of the fund being dealt with either in the family or with strangers. As soon as the uncertainty ceased, the very month after the award, the deed of August, 1813, was executed. Other arrangements were afterwards made respecting the fund, down to within a few years of Lady Cockburn's death; so that we are warranted in saying, with the Master of the Rolls, that for nearly forty years she, and those who advised her, acted upon the supposition that the interest during minority belonged to the children, in the case which arose of the funds not being realized before the time of vesting. Some question may be made as to the first seven years; but that would only have the effect of making the term of acting upon this construction thirty-two instead of thirty-nine years.

The first awards made by the commissioners on the 9th of July, 1813, were upon the two branches of Lady Cockburn's claim, as executrix of Dr. Davis. On the 12th of August, in the same year, a deed was executed by her, with Sir William Cockburn's concurrence, wherein, after reciting the settlement of 1791, and the award of the commissioners, Lady Cockburn, in order to give Mr. Clifton the benefit of the settlement, as far as she safely could, with reference to possible claims upon Dr. Davis' estate, covenants to transfer the whole stock awarded by the commissioners, (except a trifling sum due to herself) into the joint names of Sir William, herself, and Mr. Clifton's trustees, on trust to pay half the yearly interest to herself, and the other half to Mr. Clifton, for six years, and at the end of that period to transfer the whole to the trustees of the settlement of 1791. She also gives him half the sum awarded for interest since 1804, that sum representing the interest on the minority interest as well as on the rest.

[\*96] \*Here, then, is a distinct recognition of Mr. Clifton's right to the minority interest, and an actual transfer to him of the interest of that minority interest during six years,

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which he received for the six years accordingly; and in the year 1819, a deed poll was executed by Lady Cockburn and Sir William, whereby the capital stock was divided into two equal parts, and one transferred to Mr. Clifton, his trustees, and parties to whom he had pledged it.

In December of the same year, (1813,) the further award of 45,845*l.* Carnatic stock was made in Lady Cockburn's favor, as executrix of Major Rumley; but, in consequence of outstanding claims on the major's estate which remained to be liquidated, no settlement was come to with Mr. Clifton, concerning this sum, until the year 1819. In that year it was agreed, that both Lady Cockburn and Mr. Clifton should receive from the last-mentioned sum of stock yearly payments of 580*l.* each, being equal moieties of the interest which it was deemed safe to appropriate, having regard to the claims upon the estate: no doubt was started with respect to the interest during the minority and its accumulations belonging to Mr. Clifton; and on the footing of this arrangement Mr. Clifton gave Sir W. Cockburn a bond of indemnity, in case of those claims exceeding the reserve thus kept, to meet them.

In August, 1819, the further award of 7,591*l.* stock, on account of Major Rumley's bonds, was made to Lady Cockburn. But though some loan transactions have since taken place between Mr. Clifton and Sir Wm. Cockburn, no deed or agreement appears to have been executed upon this last payment being made, nor any further settlement as to the stock received under Major Rumley's will.

\*Throughout the whole of the transactions which took [\*97] place during Lady Cockburn's life, the same assumption always prevailed, that Mr. Clifton was entitled to one-half of the minority interest, whether it came from Major Rumley's or from Dr. Davis' estate, and as well in those transactions in which both parties concurred, as in matters necessarily confined to Lady Cockburn, or to Lady Cockburn and the family of her third husband. Thus, in the year 1817, she made her will, and distributed by it her whole property among the Cockburns; but she expressly states, that "having provided for her son, Charles Clifton, during her life, she has now nothing to leave him and his dear children, but her blessing and prayers." Nor could anything be more just; for the settlement, as she understood it, and as she had acted upon it, gave him one-half the fortune she possessed at her last marriage, with all the interest accruing upon it at the time when it was reduced into possession; it gave him as much as Sir William Cockburn and all her second family together. So in the year 1826 she executed her power of appointment by a deed of which much has been said in the course of this cause; and she appointed, or professed to appoint, her whole personal estate. But it is clear, as well from the deed itself, as

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from all the evidence in the cause, that she proceeded upon no supposition of the minority interest having been reserved to her in the event which had happened of the fund being realized after Mr. Clifton had attained majority. This deed, it is true, contains errors of calculation and of fact, hardly conceivable in a person apparently so accurate in all business transactions. Thus it sets out with stating that a power of naming new trustees in the settlement of 1791 had been reserved to Sir William Cockburn and herself, which is quite contrary to the fact; and it states the stock in which her fortune had become invested as 83,000*l.*, whereas its amount, on her own assumption [\*98] with \*respect to the bond for 31,500 pagodas, is no more than 80,602*l.* But the assumption which it makes respecting the bond may be taken either as founded on an error in law, or in fact; it can make no difference in the conclusion to which we must come upon this instrument.

When Mr. Clifton comes forward to claim his rights under the settlement, and alleges that whatever these may have been according to its legal construction, Lady Cockburn had concluded herself, and parties claiming under her, from setting up that construction upon one point by the deeds of 1813 and 1819, which transferred to him his share according to one construction of the original instrument, he has a clear title to assert his rights under that settlement, against any construction which she may have given it upon another point in a deed long subsequent, and to which he was not a party. It is said, that if she made a mistake of construction in his favor as to Dr. Davis' funds in 1813 and 1819, with respect to the minority interest, those who claim under the settlement of 1826 have a right to take what she there gives them, at his expense, by an opposite mistake of law against him. But independently of the consideration that the mistake in his favor was clearly one of construction, and that the mistake against him respecting the capacity in which she took the bond for 31,500 pagodas much more resembles a mistake of fact, it is to be observed that supposing the two cases were exactly parallel, and that she had first paid him money through error in law, and had afterwards, also through error in law, paid away money which belonged to him, nothing can be more clear than his right to recover the latter money, without being called upon to refund the former. She, or those who represent her, [\*99] cannot set off a payment made to him \*against his demand of what is his right, unless she or they could recover from him what had been so overpaid. Now I am of opinion, upon all principle and all authority, that the payment made to him in respect of minority interest could not have been recovered by her.

I do not feel it necessary to argue, upon the present question,



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the distinction between payment made in error of law and in error of fact. The distinction, it may be observed, is somewhat more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one; and I think I could, without much difficulty, put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule, and refuse to relieve against an error of law.

At any rate, there can be no reason to find fault with the cases where equity has relieved, notwithstanding the distinction; for in truth they lie on the very border of the two kinds of error, and are rather to be classed among instances of error in fact than in law, even where there are no circumstances of circumvention or fraud, as there clearly were in some of them. Thus, *Pusey v. Desbouverie*(a) was a release to her brother, by a sister, of her orphanage part according to the custom of London, for a fourth of its value; and it was strongly argued that she had not been informed of the amount she was giving up. *Broderick v. Broderick*(b) was a case of plain fraud; a release by an heir at law to a devisee of all his rights for 100 guineas, on a recital that a will had been duly attested when it was not, the court expressly deciding on the ground of *suppressio veri* \*from [\*100] the heir, and *suggestio falsi* in the recital. *Cocking v. Pratt*(c) was a mixed case of influence and mistake; the influence being that of which this court is peculiarly jealous, where a parent takes advantage of a child just come of age. *Ramsden v. Hyllon*(d) consisted much rather of mistake or ignorance of material fact, than error in law; and *Bingham v. Bingham*(e) was a case of certainly a very startling nature; for a person had sold another an estate which, in truth, belonged to the purchaser.

But the present case does not call for any such argument. It is to be regarded as an acting for a long course of years upon a given construction of a clause in a settlement, the clause admitting of two interpretations, and far from absolutely clear and certain in its import; the party putting the construction being the maker of the settlement, the other parties the members of the settler's family; the transactions in the course of which the construction was acted upon being domestic arrangements entirely. It is unnecessary to cite authorities to show how strongly the court always leans in support of family arrangements, and how reluctantly it will disturb them. Nor is it necessary to go so far as was done in *Cory v. Cory*,(g) where a compromise made under the influence of intoxication was supported by Lord Hardwicke, as tending to settle family differences; or in the older cases,

(a) 3 P. Wms. 315.

(b) 1 P. Wms. 239.

(c) 1 Ves. sen. 400.

(d) 2 Ves. sen. 305.

(e) 1 Ves. sen. 126.

(g) 1 Ves. sen. 19.

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where parental influence, directly exerted, was held insufficient to set aside what was done under such pressure. The more moderate view of the subject, taken in later instances, [\*101] such as *Stockley v. Stockley*, (a) is enough to bear out \*the only proposition I have any occasion here to maintain, that a construction far from being plainly and grossly erroneous, imposed upon a clause in a family settlement, ought not, if acted on by the makers of that settlement, to be disturbed by this court after their decease.

Nothing can tend more strongly than Lady Cockburn's will to show that she acted throughout upon one view of Mr. Clifton's rights, and that had she entertained a different view, her course, in disposing of her property, might have been different. She says that she leaves him nothing, because she had provided for him in her lifetime. This was upon the supposition that he was to have the minority interest with its accumulations. If she had known that he was, by the more accurate construction, to have so much less, say 10,000*l.* or 12,000*l.* less, how can we tell that she would not have said, "He shall have it notwithstanding? True, it was not received while he was on our hands, true that we struggled to maintain him when we had no help from this source of supply; but, now that the struggle is over, he shall have it nevertheless." How can any one undertake to say that, but for her firmly believing it was his by settlement, she would not have made it his by her will; that, if she had known it was her own by right she would not have disposed of it in his favor? Who shall say that, if the erroneous or doubtful construction on which she had acted had been explained to her, she would not immediately have set all right by another instrument giving him what she now found he was not entitled to?

This view of the subject appears to have struck the Master of the Rolls very forcibly—a circumstance which I mention [\*102] the rather because it shows that \*his Honor had well considered the case in both its branches; and that he was quite prepared to decide it upon the second ground, had he not conceived that the construction which he put upon the settlement precluded the necessity of going further into the argument.

If it be said that Mr. Clifton in this case is a volunteer, and that in the deeds of 1813 and 1819 he was not a party taking an interest, under a misconception of rights, for a valuable consideration, inasmuch as the settlement of 1791 was voluntary as regarded him; it must at once be admitted to be so. The consideration of marriage in that settlement certainly did not extend to him, the child of a former marriage. He took under that, and

(a) 1 V. &amp; B. 25.

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 1834.—Lord Portarlington v. Soulby.
 

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under the subsequent and consequential deeds as a volunteer, unless in so far as his agreeing to the postponement and his giving the bond of indemnity constituted a consideration. But he was no more a volunteer than those with whom he is now in conflict. They, too, take from the bounty of Lady Cockburn the same settlor, and she might have executed the power of appointment which she reserved under the settlement in favor of Mr. Clifton, as well as of Sir William Cockburn, or the children of the third marriage, or to the exclusion of all her children of the first, as well as of the last. In this respect the parties stand upon the self same footing; and they who now contest his right with Mr. Clifton are, as his Honor observed, not Lady Cockburn, or any one representing her, but the other objects of her benevolence. That she contemplated throughout the possibility of his having much more than a distributive share of her property is manifest. By the settlement she gives him his sister's share in the event which has actually happened of her predecease, and she thus provided for a case in which he \*should have as much of the capital as herself, her husband, and all the issue of her contemplated marriage together could possibly ever take. [\*103]

I have no hesitation in affirming the decree of the Master of the Rolls; and in so doing, it becomes me again to express my concern that all the parties did not agree to the recommendation of the common friends to whom I will not say they referred their claims, but to whom they resorted for counsel and assistance. Where such advice failed, it is possible they may not take any that I can offer. I shall, therefore, close my observations upon the case, by adding that I see nothing on either side which calls for any expression whatever of blame; and that this decree be affirmed.

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 \*LORD PORTARLINGTON v. SOULBY.

[\*104]

1834: 24th March; 15th April.

Injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt, under the circumstances continued.

Jurisdiction of the Court of Chancery to stay the proceedings of parties in foreign courts.

MR. ROLFE moved that an injunction granted by the Vice-Chancellor, whereby the defendants were restrained from suing in Ireland upon the bill of exchange in the pleadings mentioned, might be dissolved.

*The Solicitor-General (Sir C. Pepys) and Mr. Bagshawe, for the plaintiff, opposed the motion.*

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 1834.—Lord Portarlington v. Soulby.
 

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The grounds on which the application was supported on the one side, and resisted on the other, are fully stated in the judgment.

*April 15th.*—THE LORD CHANCELLOR:—This was a motion to dissolve an injunction, granted to restrain the defendants from suing in Ireland upon a bill of exchange for 1,000*l.* accepted by the plaintiff, payable to a person of the name of Aldridge, by whom it was indorsed and passed away to Mr. Brook, a retail dealer in wines, and by him to the defendants.

The ground of the injunction is, that the bill was given by Lord Portarlington for money lost at play.

Messrs. Soulby are respectable wine merchants, who had previously had dealings with Mr. Brook. In 1831, Mr. Brook, having occasion for a loan of money, applied to them, and proposed to them to discount the bill in question, and [\*105] Messrs. Soulby thereupon advanced him \*700*l.*, Brook agreeing to take 300*l.* worth of wine to make up the residue, and at the same time giving his own acceptance for the sum so advanced. The wine never was delivered, except to the value of about 38*l.*

Now, upon this part of the transaction, it may be remarked, that a party obtaining the loan of money, and not merely giving a security for repayment of the sum advanced to him, but giving another security to the amount of nearly half as much more, and then taking goods and not money to that whole amount, especially when he does not put his own name on the back of the bill, affords, *prima facie*, a proof of his embarrassment—of the person so raising money being put to shifts, and even of his having some knowledge, which he withholds, of the origin of the security. This ought to excite suspicion, and to cause inquiry; nor can any one doubt that Messrs. Soulby, as prudent men, must have questioned Mr. Brook as to how he came into possession of the bill bearing Lord Portarlington's name upon it.

But, although there is sufficient ground for holding that the bill was taken in circumstances which were calculated to raise suspicion, and ought to have occasioned inquiry, still there is no necessity for proving such a case, much less for showing that the defendants knew of the illegal consideration, in order to sustain the injunction. The fact of the illegality of the consideration is distinctly alleged, with the circumstances of the gambling transaction; and to this allegation, supported by the plaintiff's oath, no contradiction whatever is given in the answer; nor do the defendants, who rely on their affidavit, as the answer has been excepted to, and the exceptions allowed, aver anything but their own ignorance, and their belief of their father's ignorance of the origin of the bill; and they produce no affidavit at all

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\*from Brook, a circumstance of itself nearly decisive, [\*106] both that the case made by the bill is true, and that Brook was aware of the fact. Nothing else can account for his not joining in an affidavit to answer that of the plaintiff, his interest being clearly identical with Messrs. Soulby's. It is further to be observed, that the defendants show by their affidavit, that they have been in correspondence with Aldridge, and yet they do not swear that they are now ignorant of the illegal consideration, or of Aldridge keeping a gaming-house, but only that they knew it not in the year 1831, when they took the bill.

The case, therefore, is reduced to this. An illegal consideration distinctly stated, and not denied, with several circumstances leading to the belief, that the defendants now know such to have been the origin of the bill; and several circumstances also showing that it was taken by their late partner under suspicion, and yet without inquiry.

It is, then, impossible to doubt that the injunction was well granted, and the whole question would be free from difficult, but for one peculiarity in the case,—the action is brought in Ireland, and the interposition of this court is sought to stop proceedings there. That this is an unusual proceeding must be admitted, but I do not see any ground for questioning the competency of it.

Soon after the restoration, and when this, like every other branch of the court's jurisdiction was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors, the Nottinghams and Macclesfields, the parents of equity, the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported \*shortly in Freeman's reports, and somewhat [\*107] more fully in Chancery Cases, under the name of *Love v.*

*Baker.*(a) In *Love v. Baker*, it appears that one only of several parties who had begun proceedings in the court of Leghorn, was resident within the jurisdiction here, and the court allowed the subpoena to be served on him, and that this should be good service on the rest. So far, there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain those proceedings at Leghorn, after advising with the other judges; but the report adds, "*sed quære*, for all the bar was of another opinion;" and it is said, that when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given, that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever affects to bind, our

(a) 2 Freem. 125. 1 Ch. Ca. 67.

orders being only pointed at the parties to restrain them from proceeding.

Accordingly, this case of *Love v. Baker*, has not been recognized or followed in later times. Two instances are mentioned, in Mr. Hargrave's collection, of the jurisdiction being recognized; and in the case of *Wharton v. May*,<sup>(a)</sup> which underwent so much discussion, part of the decree was to restrain the defendants from entering up any judgment, or carrying on any action, in what is called "the Court of Great Session in Scotland," meaning, of course, the Court of Session.

[\*108] \*I have directed a search to be made for precedents, in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of *Campbell v. Houlditch*, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the Court of Session in Scotland. From the note which his lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority.

In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if, for instance, as in *Penn v. Lord Baltimore*,<sup>(b)</sup> it can decree the performance of an agreement, touching the boundary of a province in North America; or, as in the case of *Toller v. Carteret*,<sup>(c)</sup> can foreclose a mortgage in the isle of Sark, one of the channel islands; in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign court.

[\*109] \*It is upon these grounds, I must add, and these precedents, that I choose to rest the jurisdiction, and not upon certain others of a very doubtful nature, such as the power assumed in the year 1682, in *Arglasse v. Muschamp*,<sup>(d)</sup> and again by Lord Macclesfield in the year 1724 in *Fryer v. Ber-*

(a) 5 Ves. 71. See also *Kennedy v. Earl of Cassillis*, 2 Swans. 313; *Bushby v. Munday*, 5 Mad. 297; *Harrison v. Gurney*, 2 J. & W. 563; *Beauchamp v. Marquis of Huntley*, Jac. 546.

(b) 1 Ves. sen. 444.

(c) 2 Vern. 494.

(d) 1 Vern. 75.

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*nard*, (a) of granting a sequestration against the estates of a defendant situated in Ireland. The reasons given by that great judge in the latter case, plainly show that he went upon a ground which would now be untenable, viz., what he terms the superintendent power of the courts in this country over those in Ireland; and indeed he supports his order by expressly referring to the right then claimed by the King's Bench in England to reverse the judgments of the King's Bench in Ireland. This pretension, however, has long ago been abandoned, and has indeed been discontinued by parliamentary interposition; and the power of enforcing in Ireland judgments pronounced here, and *vice versa*, is at the present time the subject of legislative consideration.

As to the argument that the courts of equity in Ireland can, if applied to, restrain the action, the same consideration would prevent an injunction from ever issuing to stay proceedings in this country; for it might be said that the Court of Exchequer has the power of restraining, and, therefore, there needs no interposition of the Court of Chancery. It suffices to say that the court in which the action is brought is a court of common law, and has no jurisdiction as such to stop the proceeding upon the ground now set forth.

I am, therefore, of opinion, that this injunction was well issued, and that it must be continued, and that this motion must be refused with costs.

(a) 2 P. Wms. 261.

\*JOSLIN *v.* HAMMOND.

[\*110]

ROLLS.—1834: 30th January.

A testator gave his whole property to his wife, upon condition that she should pay an annuity of 130*l.* to his mother during her life, and after the death of his wife to be equally divided between those of his children who should survive her, share and share alike. All the testator's children died in the lifetime of his widow, who married again, and died leaving her husband surviving her; Held, upon her death, that in the events which had happened, the testator's property was undisposed of, and that the next of kin, and not the second husband in right of his wife, were entitled to it.

THE will of the testator, John Brooks, as far as related to the question in the cause, was in the following words: "I give and bequeath to my dear wife, Mary Ann Brooks (whom I appoint my executrix), the whole of my property wherever it may be invested, or in whatever channels it may lie, on condition of paying my dear mother, Sarah Brooks, 130*l.* per annum during her, the aforesaid Sarah Brooks', life. At the death of my dear

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wife, Mary Ann Brooks, the whole of the property to be equally divided among those of my children who may survive her, share and share alike. I do likewise particularly desire that the whole of the property may be laid out legally in mortgages on land, and may so remain. Should my afore-named dear wife marry again, each of my children on arriving at the age of twenty-four shall be paid 400*l*. Should she not marry again, I leave them implicitly to her kind and indulgent care." And the testator appointed his wife, Ann Brooks, David Robinson and Thomas Ridley, executors of his will.

The testator died in the year 1812, leaving his widow, Mary Ann Brooks, and one child, Mary Ann, surviving him; and his will was proved by the executors named therein. A posthumous child, Edward Brooks, was afterwards born, who died in early infancy, leaving his mother and sister his next of kin.

Mary Ann Brooks, the younger, intermarried with the plaintiff, Henry Joslin, and died in the year 1831, under the [\*111] \*age of twenty-four, in the lifetime of her mother, without issue.

The testator's widow intermarried with the defendant, William Hammond, and died in the year 1832, and the testator's mother died in the year 1829.

The question in the cause was, whether the defendant Hammond was, in right of his deceased wife, entitled absolutely to the whole property of the testator, or whether the testator, in the events which had happened, was to be considered as having died intestate.

Mr. *Bickersteth*, Mr. *Pemberton* and Mr. *Torriano*, for the representative of the deceased children of the testator, argued that upon the whole context of the will, it was clearly the intention of the testator to confine his wife's interest to an interest for life; and that as he had made no provision for the contingency of the children dying in her lifetime, there was an intestacy in the events which had happened, and the testator's property was consequently divisible in equal third parts between the representatives of the testator's two children and widow respectively.

Mr. *Treslove* and Mr. *Martin*, for the defendant Hammond :— This testator gives, in the first instance, to his wife the whole of his property, wheresoever it may be invested, and in whatever channels it may lie, subject to the payment of an annuity of 130*l*. a year to his mother. There can be no doubt that if the will had stopped there, the wife would have taken an absolute interest subject to the annuity. But that interest is subsequently cut down to an interest for life in certain contingencies [\*112] \*which have not happened. The absolute interest,



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therefore, remains, and the defendant Hammond, in right of his wife, is entitled to it. In *Sturgess v. Pearson*(a) where there was a gift to all the children, or such of them as should be living at the wife's death, and all the children died in the lifetime of the mother, the court held that as a gift to all the children was, by the alternative form of the expression, defeated upon the contingency of there being some of the children living at the mother's death, and that contingency did not happen, the primary expression giving vested interests to the children took effect. *Smither v. Willock*,(b) was determined upon a similar principle.

THE MASTER OF THE ROLLS:—It appears to me that, upon the whole context of this will, it was the intention of the testator that in no event the wife should have other than a life estate. If at her death a child or children survived her, they were to take the property between them; but he has not provided for the case of all the children dying during the life of his wife, and that event having happened, he has so far died intestate. It is not a probable intention to be imputed to the testator that, if his children died in the lifetime of his wife leaving families, his widow on her second marriage should enjoy the whole property.

(a) 4 Madd. 411.

(b) 9 Ves. 233.

## \*HUNTER v. ATKINS.

[\*113]

ROLLS.—1832: 22d and 23d July. L. C.—1834: 11th, 12th, 13th, 14th and 24th February.

Gift by deed, subject to a power of appointment by the donor; from a person upwards of ninety years of age to a confidential agent, who had for many years been in habits of friendship with the donor, without the intervention of a disinterested third person, the solicitor who drew the deed being the solicitor of the person who took the benefit under it, declared void at the Rolls; but supported, under all the circumstances, upon appeal.

THE bill was filed by Elizabeth Hunter, the widow and administratrix, with the will annexed, of Admiral Lauchlan Hunter, deceased, against John Atkins, John Pelly Atkins, and John Roberts, for the purpose of setting aside a deed which, it was alleged, the defendants had fraudulently procured to be executed by the late Admiral Hunter.

The bill stated, that the late Admiral Lauchlan Hunter was placed on the list of superannuated rear-admirals of his Majesty's navy in the year 1808, when he was 76 years of age, and that he continued on such list till his death, which happened in the month of August, 1830. That having no children of his own, about twenty years before his death he took Elizabeth Orby

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Hunter, a niece of the plaintiff, to live with him and the plaintiff, and that Elizabeth Orby Hunter from that time continued to reside with him and the plaintiff, and was treated and passed in the world as their adopted daughter. That before Admiral Hunter was placed on the list of superannuated rear-admirals, he received a severe injury on the head from a cannon ball, which at times rendered him liable to fits of mental derangement, and that such fits increased in frequency and violence during the last twelve years of his life; and that when he was so affected he had a violent antipathy and dislike to the plaintiff and Elizabeth Orby Hunter, to whom at other times he was strongly attached, and that during such periods he would frequently leave his home for several days, till the influence of the fit was over, [\*114] when he would return \*and resume his ordinary mode of life. That during the latter period of his life his mind and intellects were so weak and imbecile, that, even when he was not laboring under such temporary fits of mental derangement, he was almost childish, and wholly incapable of understanding or transacting business.

The bill then stated, that for many years previous to the year 1811, Admiral Hunter had employed the defendant, John Atkins, as his agent and banker; and that John Atkins having, in the year 1811, taken his son, John Pelly Atkins, into partnership with him, Admiral Hunter employed the defendants, John Atkins and John Pelly Atkins, as his agents and bankers, from the date of such partnership to the time of his death. That the half-pay of Admiral Hunter, which amounted, in the first instance, to the annual sum of 400*l.* and was afterwards increased to 456*l.*, was, with the exception of the periods therein mentioned, received by John Atkins, or by the firm of Atkins & Son; and that in the year 1809, when Admiral Hunter was making arrangements for removing to Yarmouth, where, in the following year, he went to reside, he executed a power of attorney to the defendants, John Atkins and John Pelly Atkins, to receive a sum of 105*l.* long annuities, possessed by him, and also to sell all or any part of such long annuities; that by virtue of such powers, Atkins & Son sold 38*l.* out of the 105*l.* long annuities, and placed the produce of sale to the credit of Admiral Hunter's account, and that they continued during the life of Admiral Hunter to receive the dividends of the remaining 67*l.* long annuities; and that during the whole period from 1811 till the time of Admiral Hunter's death, there was a running account between Admiral Hunter and the defendants, Atkins & Son, as his bankers and agents. That Admiral Hunter reposed the greatest [\*115] \*confidence in John Atkins, and was in the habit of consulting him in all his affairs; that the influence which John Atkins had acquired over the mind of Admiral

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Hunter, increased greatly during the latter years of the admiral's life, when his mind was imbecile; and that Admiral Hunter, for some years before his death, was implicitly guided by John Atkins, not only in matters relating to his pecuniary affairs, but in all other matters.

The bill proceeded to state, that in May, 1823, Admiral Hunter, accompanied by the plaintiff and Elizabeth Orby Hunter, came up to London from Yarmouth, where they were then residing. That a few weeks after their arrival in London, Admiral Hunter was attacked by one of his occasional fits of temporary derangement, and that he then insisted upon the plaintiff and Elizabeth O. Hunter returning to Yarmouth, and leaving him in London alone. That on the plaintiff endeavoring to persuade Admiral Hunter to return to Yarmouth, or to permit the plaintiff to remain with him in London, the admiral's violence was greatly increased, and the plaintiff accordingly yielded to his wishes, and returned, together with E. O. Hunter, to Yarmouth, in July, 1823, leaving the admiral in the care of a confidential servant, and recommending him to the care and attention of the defendant, John Atkins. That the defendant, John Atkins, had long previously known that Admiral Hunter was subject to fits of mental derangement, and that when he was not laboring under such fits he was so weak and imbecile in his intellects as to be nearly childish, and that he accordingly promised the plaintiff that he would carefully look after him so long as the admiral should remain in London, and do everything in his power to protect him, and persuade him to return to Yarmouth as soon as possible.

\*The bill then stated, that in the month of July, 1823, [\*116] there was a balance of 1,039*l*. 19*s*. belonging to Admiral Hunter, in the hands of John Atkins and John Pelly Atkins, as the admiral's bankers; and that after the plaintiff and E. O. Hunter had returned to Yarmouth, John Atkins and J. P. Atkins formed a scheme to procure Admiral Hunter to execute a deed whereby the principal part of the said balance of 1,039*l*. 19*s*. should be secured to themselves after the death of Admiral Hunter, and that they employed the defendant, John Roberts, their solicitor, to assist them in carrying such scheme into execution. That in pursuance of such scheme John Atkins and J. P. Atkins invested the sum of 900*l*., part of the balance of 1,039*l*. 19*s*. belonging to Admiral Hunter, in the purchase of 900*l*. new 4 per cent. bank annuities, to be transferred into the joint names of Lauchlan Hunter, John Atkins and John Pelly Atkins, as soon as the transfer books, which were then shut, should be opened. That John Roberts prepared a deed poll, dated the 11th of July, 1823, and expressed to be made by L. Hunter, J. Atkins and J. P. Atkins, whereby, after reciting that 900*l*. new 4

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per cent. bank annuities had been purchased, and would be transferred into the names of the parties to this deed, it was witnessed, that it was thereby agreed and declared by and between the parties thereto, that they the said J. Atkins, J. P. Atkins and L. Hunter, their executors, administrators and assigns, should stand and be possessed of and interested in the said sum of 900*l.* new 4 per cent. bank annuities, upon trust from time to time, during the life of the said L. Hunter, to make sale of the same, or any part or parts thereof, and to dispose of the money to arise thereby in such manner as he, the said L. Hunter, should, by any writing under his hand, from time to time direct and appoint; and in default of, and until such direction and appointment

[\*117] \*should be made, and as to so much and such part thereof to which any such direction or appointment should not extend, upon trust to permit and suffer the said L. Hunter to receive the interest or dividends thereof during his life; and from and immediately after his decease, upon trust to raise thereout the sum of 130*l.*, and pay the sum of 100*l.*, part thereof, to Lucinda Hunter, in case she should be then living, and the sum of 30*l.*, residue thereof, to Donald M'Duffie, if he should be then living, and subject thereto, and as to the residue of the said bank annuities, and the interest or dividends thereof, upon trust for the said John Atkins, his executors, administrators and assigns, and to, for and upon no other trust, interest, or purpose whatsoever. That in the same month of July, the defendants procured the said deed to be executed by Admiral Hunter, and that at the time of such execution, Admiral Hunter was laboring under the before-mentioned fit of mental derangement, and without any friend and adviser; and that the defendant, John Atkins, possessed an absolute control and influence over him, and was able to make him do whatever he pleased. That the deed was never read over to Admiral Hunter, nor perused on his behalf by any professional person, and that he never knew or understood the nature or purport of the deed which he had executed. That at the time he executed the deed, he also executed a will, which had also been prepared for his execution by the defendant, J. Roberts. That the deed so executed was retained in the possession of J. Atkins, or of J. Roberts as his solicitor; and that the fact of Admiral Hunter having executed such a deed was studiously concealed by the defendants from the plaintiff, and the relatives and friends of Admiral Hunter.

[\*118] \*The bill proceeded to state, that the sum of 900*l.* 4 per cent. bank annuities, was transferred into the names of L. Hunter, J. Atkins and J. P. Atkins, upon the opening of the transfer books, on the 22d of July, 1823; that the defendants, J. Atkins and J. P. Atkins, regularly received the dividends thereof during the life of Admiral Hunter, and never ac-

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counted to Admiral Hunter for the same. That shortly after the execution of the deed, Admiral Hunter recovered from the fit of temporary derangement under which he had been laboring, and returned to Yarmouth. That he had then wholly forgotten the fact of his having executed such deed; and that he, consequently, never mentioned the same during the rest of his life to the plaintiff, or to any member of his family. That Admiral Hunter died on the 14th of August, 1830, having, by his will, appointed J. Atkins his sole executor. That J. Atkins renounced probate of the will; and that in November, 1830, letters of administration with the will annexed were granted to the plaintiff.

The bill proceeded to set out a correspondence between the defendant, J. Roberts, and the solicitors of the plaintiff, relative to the deed of the 11th of July, 1823, and the banking accounts with Admiral Hunter, as kept by Messrs. Atkins & Son.

The bill charged, among other things, that the said sum of 900*l.* formed a great part of the property which Admiral Hunter had to leave for the support of the plaintiff and his adopted daughter, E. O. Hunter; that at the time Admiral Hunter executed the deed, he understood and believed that he was executing a will; that no professional person except J. Roberts, the solicitor of J. Atkins, was ever consulted by Admiral Hunter, or advised him as to the propriety of executing the deed; \*and that J. Roberts prepared the deed in fraudulent [\*119] collusion with the defendants, J. and J. P. Atkins, and ought, therefore, to be decreed to pay the costs of this suit, as well as the defendants, J. Atkins and J. P. Atkins.

The bill prayed that the deed of the 11th of July, 1823, might be declared fraudulent and void, and that the same might be decreed to be delivered up to be cancelled; that the defendants, J. Atkins and J. P. Atkins, might be ordered to transfer to the plaintiff, the said sum of 900*l.* 4 per cent. bank annuities, and pay to the plaintiff the dividends which had accrued due thereon, and had been received by the said defendants.

The defendants, J. Atkins and J. Pelly Atkins, by their answer, stated that they did not know whether the late admiral had received any injury in the head; that they never saw him in any such fits of mental derangement, as the plaintiff alleged that he was subject to; and that they did not believe his intellects were affected by any mental malady; that they never found him of unsound mind during the last twelve years of his life, and that his letters during that period were written with good sense, and every mark of a clear understanding. That the late admiral frequently complained to the defendant, J. Atkins, of domestic differences, and of the violent treatment he received from the plaintiff and E. O. Hunter, which was such, as in the defend-

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ant's belief, caused him at times to leave his house, and to have a great antipathy both to the plaintiff, and E. O. Hunter, but that on such occasions, the defendant, J. Atkins, used every means in his power to induce him to return home, and recommended less violent conduct on the part of the plaintiff

[\*120] and E. O. Hunter, towards the admiral. \*The defendant, J. Atkins, was employed solely as the agent and banker of the late admiral, from the month of September, 1808, to the 1st of January, 1811; and that afterwards the defendants, J. Atkins and J. P. Atkins, were occasionally employed as the agents and bankers of Admiral Hunter until the time of his death. That the defendant, J. Atkins, did, on the 2d of December, 1809, sell out 38*l.* of the 105*l.* long annuities belonging to the admiral, and that he continued to receive the dividends on the remaining sum of 67*l.* until the admiral's death; and that there was, throughout the period mentioned in the bill, a running account between Admiral Hunter and the defendants. That they believed the late admiral reposed great confidence in both of them, and particularly in the defendant, J. Atkins; but they denied, that during the last twelve years of his life, the admiral was implicitly guided by the advice of J. Atkins. That they never heard, nor did they believe that the admiral was subject to such fits of violence as that which the plaintiffs stated he was under in July, 1823, when, as they alleged, the admiral insisted upon the plaintiff and E. O. Hunter returning to Yarmouth. That the plaintiff never, as she alleged, informed J. Atkins of the admiral's inability to take care of himself, or recommended him to the care and protection of J. Atkins. They admitted, that in July, 1823, they had a balance of 1,039*l.* 19*s.* in their hands belonging to the admiral, but denied that any such fraudulent scheme as that alleged by the plaintiff, was ever framed by them, or either of them; and insisted that the admiral's state of mind was that of a person fully capable of managing his affairs. They admitted, that J. Roberts was their solicitor, and at that time unknown to the admiral, but said that he was introduced by them to the admiral at the admiral's own desire, and employed by the admiral as his confidential solicitor, and instructed

[\*121] \*by the admiral to make his will and the deed in question; and that the deed was prepared by J. Roberts, by the sole direction of the admiral, and according to the instructions personally given by him, and without the presence or interference of either of the defendants; and that the same was executed by the admiral without the knowledge or procurement of the defendants, who did not execute it until some time afterwards. That they believed the admiral fully understood the nature and purport of the deed at the time of executing the same; but they admitted that the admiral did afterwards, in a letter

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dated the 16th of July, 1823, and addressed to the defendant, J. Atkins, speak of the deed as a will. That, on the 15th of September, 1824, the defendant, John Roberts, attended Admiral Hunter at the admiral's request, at the defendants' counting-house, and there read over the will and the deed in question, and that Admiral Hunter expressed himself quite satisfied with them, and refused to alter either of them. That they received the dividends of the 900*l*. 4 per cent. bank annuities during the admiral's life, and kept a separate account of them as of trust stock.

The defendant, John Roberts, by his answer, stated that he had never been employed by Admiral Hunter except on the occasion of preparing his will and the deed in question; and that he prepared the deed by the express directions of Admiral Hunter, and without any instructions from or communication with the other defendants. That Admiral Hunter was introduced to the defendant by John Jackson, the clerk of Alderman Atkins, on the 10th of July, 1823, at the defendant's office. That Admiral Hunter then gave instructions for the preparation of the deed and will, and that the deed was executed on the following day. That the admiral was perfectly sane and competent to the management of his affairs, \*and that he [\*122] clearly and perfectly understood the nature and purport of the deed executed by him, which was made in conformity with his own instructions. That the defendant did not believe John Atkins had any such influence or control as was alleged over the mind of Admiral Hunter; but on the contrary the defendant, at the direction of John Atkins, endeavored to dissuade Admiral Hunter from settling the stock on John Atkins, and used every argument he could think of for that purpose, as did also John Jackson, the confidential clerk of John Atkins. That on the 15th of September, 1824, he attended the admiral respecting some alteration in his will, and that he then read over both his will and the deed, when the admiral expressed himself perfectly satisfied with them, and refused to make any alteration in either of them. The defendant denied that he had charged the expenses of preparing the deed to the defendants, J. Atkins and J. P. Atkins, or that the defendants, J. Atkins and J. P. Atkins, or either of them, paid such expenses.

A great number of witnesses were examined on both sides, to prove, on the one hand, the general imbecility of Admiral Hunter's mind during the last eight or ten years of his life, and that he was, during that period, wholly incapable of managing his affairs; and on the other, that Admiral Hunter was, for a person of his advanced age, fresh and vigorous in his intellects, and, during the whole of the above mentioned period, fully competent to transact matters of business. The correspondence of Admiral Hunter with the defendant, John Atkins, from the year

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1810 down to a period shortly antecedent to the execution of the deed of July, 1823, was produced as evidence of the mental capacity of the admiral, as well as of the great friendship and kindness which he entertained for the defendant John Atkins. [\*123] \*The alleged fits of insanity, though deposed to by one of the plaintiff's witnesses, were not supported by the general testimony of the witnesses examined on the plaintiff's behalf, some of whom, indeed, spoke to occasional eccentricities, but none, with the exception alluded to, sustained the allegation of fits of insanity. Much evidence was read as to the other parts of the case, the nature and application of which will be collected from the argument and the judgments.

Mr. *Bickersteth*, and Mr. *Sharpe*, for the plaintiff.

Mr. *Pemberton* and Mr. *Beames*, for the defendants J. Atkins and J. P. Atkins.

Mr. *Agar*, and Mr. *Richards*, for the defendant Roberts.

For the plaintiff it was contended, that the evidence, though conflicting as to the extent to which Admiral Hunter's mental faculties were impaired, and though it must be admitted to have failed in establishing a case of insanity, or absolute prostration of intellect, nevertheless fully showed that the admiral's great age and general imbecility rendered him wholly incapable of transacting or comprehending matters of business. That the defendant Alderman Atkins, stood in a confidential relation to the admiral could not be disputed; for it was proved by a great body of correspondence and accounts, that the admiral confided to Alderman Atkins the whole management of his pecuniary affairs, and the stock in question was actually purchased with a balance belonging to the admiral, which had been for many years accumulating in the hands of Messrs. Atkins & Son. The solicitor who prepared the deed under which a large proportion [\*124] of the admiral's property was \*given away from his family to Alderman Atkins and his son, was the solicitor of Alderman Atkins, and the admiral was wholly without the advice or protection of any professional person on his behalf. The presence of a disinterested third person was an essential ingredient to give validity to gifts from persons of great age and impaired understanding, of whose infirmities advantage might easily be taken if they had not such protection. That principle was distinctly laid down in *Griffiths v. Robins*,<sup>(a)</sup> where a deed of gift was set aside upon the ground that it had been obtained from

(a) 3 Mad. 191.



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a woman upwards of eighty years of age, and nearly blind, by parties who stood in a confidential relation to her, without the intervention of an indifferent third person. His Honor, alluding to the parties who so obtained the gift, said, "They stood in a relation to her which so much exposed her to their influence, that they can maintain no deed of gift from her unless they can establish that it was the result of her own free will, and effected by the intervention of some indifferent person." The same principle was recognized in *Pratt v. Barker*,<sup>(a)</sup> where the intervention of a disinterested third person was one of the grounds relied upon by the court for refusing to set aside a gift made by an old and infirm person. It was stated by Roberts, in his answer, that he received his instructions directly from the admiral, and that before the execution of the deed no communication took place between him and the alderman; but there was irresistible evidence upon the face of the draft prepared by Roberts, to show that there must have been such communication. The draft contained a recital that the sum of 900*l.* 4 per cents. was standing in the names of L. Hunter and John Atkins, which was afterwards altered, and a recital to this effect \*substituted: "Where- [\*125] as the sum of 900*l.* 4 per cents. has been purchased, and the same will be transferred into the names of J. Atkins, J. P. Atkins, and L. Hunter, as soon as the transfer books shall be opened;" the names of the alderman and his son being placed first, and that of the admiral last. No copy, either of the deed, or of the will which was executed at the same time with the deed, was given to the admiral, but a memorandum of the contents of the will made by the defendant Roberts was found among the papers of the admiral after his decease. A memorandum of the contents of the deed was also made at the time by Roberts, but that appeared to have been afterwards given to Alderman Atkins. The fact of such a deed having been executed by the admiral was studiously concealed from his family; and even the existence of the property which was the subject of the gift was unknown to the admiral's wife and niece; for the dividends of this stock were never entered by Messrs. Atkins & Son in the pass book with the other moneys received by them on the admiral's banking account. So entirely ignorant was the admiral himself of the deed which he had been made to execute, that, when he was at Bury, on his way homeward, on the 16th of July, five days after the execution of the deed, he addressed a letter to the alderman, stating that he had made a little mistake in his will, and that he wished M'Duffie to have 100*l.* instead of 30*l.* It was the deed in which the admiral had made the gift of 30*l.* to M'Duffie; but the alderman, instead of explaining the

<sup>(a)</sup> 4 Russ. 507.

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error, pretended to adopt it, and, in his answer, endeavored to keep the admiral as much as possible in his state of confusion, by recommending him "to write to Mr. Roberts about his will, and explain with him, and make every alteration satisfactory to his own mind, as he (the alderman) wished he should do so independent of every other person." No doubt the alderman [\*126] was perfectly indifferent as to any alterations the admiral might make in his will, by which he was merely appointed an executor without legacy or remuneration; but he took care to conceal from him the existence of the deed, to which the admiral's inquiries were really directed, and of which, as distinguished from a will, all traces were plainly obliterated from the admiral's mind within a week from the time of its execution.

On the other side it was insisted, that the consequence, if not the object of the manner in which this suit had been framed, had been to cast unfounded aspersions upon the character of the defendants. None of the allegations as to the injury received by the admiral from a cannon ball, his fits of insanity, or his mental imbecility, had been supported by the evidence. A friendship had subsisted for upwards of forty years between Admiral Hunter and Alderman Atkins; the admiral had made several wills, containing bequests to the alderman, previously to that which he finally executed in favor of the plaintiff, and the deed in question was an instrument of a testamentary nature, by which the admiral reserved to himself during his lifetime the power of appointing the stock to such uses as he should declare, and, in default of appointment, gave the benefit of it to the alderman and his son. The reservation of such a power, and the impossibility of controlling the exercise of it, negatived all suspicion of fraud and contrivance. It was true, that at the age of ninety the admiral was not, nor could he be expected to be in the same vigorous possession of his intellectual powers as in the prime of life; but his letters proved that his mind was competent to the transaction of the ordinary business of life, and were wholly incompatible

[\*127] with the case attempted to be made out by the \*plaintiff.

If, indeed, the admiral were the idiot which the plaintiff represented him to be, his will must be as invalid as the deed, for both deed and will were executed at the same time. Yet the plaintiff had sworn to the validity of the will, for it was in the character of administratrix to the admiral's estate with that will annexed, that she had instituted this suit. By admitting that the admiral was of sufficient disposing mind to make the will, she was precluded from disputing the validity of the deed. So inconsistent were the acts of the plaintiff with the case alleged by her bill, that even in the year 1830, the year in which the admiral died, she joined with her husband in suffering a recovery of certain estates to which she was entitled. The admiral did not

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live upon terms of the most unreserved confidence with his wife and niece, and the account of the dividends of the stock was kept separately from the general account, at the admiral's desire, that the wife and niece might not have the opportunity of knowing the whole amount of his property. The memoranda of the contents of the deed and the will were written upon the same piece of paper; and, upon the paper being divided, one of the memoranda appeared to have been handed to the admiral, and one to the alderman. As to the admiral's letter from Bury, and the alderman's answer to it, the best and fairest course was to refer the admiral to the solicitor who drew both the deed and the will; and, in fact, both the deed and the will were afterwards read over to the admiral, and received his entire approbation.

*July 23d.*—THE MASTER OF THE ROLLS:—It appears to me, upon the whole evidence in the cause, that Admiral Hunter, who, at the time he \*executed the deed in question, was about the age of ninety-two years, had, to a considerable extent, a disposing power of mind; that he was equal to the common purposes of life, and capable of rational conversation upon ordinary matters, but that he was not competent to nor capable of fully understanding matters of business. On the 27th of June, 1823, an account is stated to have been settled between Admiral Hunter and Mr. Alderman Atkins, by which it appeared that a sum exceeding 1,000*l.* was due on balance to the admiral. On the day following a part of this balance was invested by Mr. Alderman Atkins in the purchase of a sum of 900*l.* new 4 per cent. bank annuities, in the joint names of himself, his son, and the admiral. On the 10th of July following, the admiral's family left London; but the admiral remained in London, alleging that he had a matter of business to transact with Mr. Alderman Atkins, and on the same day he called upon the alderman with a view to this matter of business, and was referred by him to the defendant Mr. Roberts, who had for some years been employed by the alderman as his attorney. On the same day Mr. Roberts, by the instructions of the admiral, prepared the deed in question, being a declaration that the 900*l.* stock was held in trust for such purposes as the admiral should by writing appoint, and in default of appointment upon trust to permit the admiral to receive the dividends during his life; and after his death to raise, by sale of a sufficient part of the stock, a sum of 130*l.* to be paid to two persons named in the deed; and as to the residue of the stock, upon trust for the benefit of Mr. Alderman Atkins, his executors, administrators and assigns.

The admiral lived till the year 1830, but never executed his power of appointment as to the stock; and the stock, subject to the payment of 130*l.*, is now \*claimed by [\*129]

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Mr. Alderman Atkins. At the same time with this deed, Mr. Roberts prepared a will for the admiral, by which the rest of his property, amounting, as it is said, to about 1,400*l.*, was given to his wife and her niece, whom he had received and educated as his child. Both these instruments were executed on the next day by the admiral, and the deed was, at the same time, executed by the alderman and his son. It is not in evidence that the alderman had any communication with Mr. Roberts respecting the preparation of these instruments before Mr. Roberts saw the admiral; but it is established that, after the preparation of the drafts of the instruments, and before their execution, there had been a communication between the alderman and Mr. Roberts upon the subject of their contents.

That the admiral had, a few days afterwards, a very imperfect notion of the effect of the instruments which he had thus executed, is evident from a letter which he wrote to the alderman on the 16th of July, from Bury, where he was on his journey homeward; and the observation which has been pressed upon the court, that the alderman did not immediately fully explain the subject to him, is not without weight.

It is evident that the wife and niece were ignorant not only of the transaction, but of the fact that the admiral possessed the property with which the stock was purchased; and the circumstance that the dividends of this stock were not entered in the pass book with the other moneys received by the alderman for the use of the admiral, justifies the inference which has been drawn from it at the bar, that there was an intention to keep the wife and niece in ignorance on the subject. That the [\*180] alderman had been for many years the most confidential friend of the admiral, and had great influence over his mind, is out of all doubt; and upon the whole case, without coming to any conclusion upon the point whether the deed was the effect of influence upon the admiral, or was the spontaneous act of the admiral's own mind, I am of opinion that, considering the age and imbecility of the admiral, and the relation in which Mr. Alderman Atkins stood to him, no gift from Admiral Hunter to Mr. Alderman Atkins could be maintained in a court of equity, unless more protection had been thrown around the admiral than appears in this case.

It was upon these principles that the case of *Griffiths v. Roberts*,<sup>(a)</sup> which has been referred to, was decided; and upon these principles it is, that a court of equity will not permit gifts from a ward to his guardian, or from a client to his solicitor, so long as that relation subsists between them. The deed, therefore, must be declared void, and must be delivered up to be cancelled.

(a) 3 Mad. 191.

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It has been objected that Mrs. Hunter has adopted and acted under the will which was made at the same time with the deed; but it by no means follows that the will under which Mr. Alderman Atkins took no interest is to fail with the deed. The imprudent conduct of Mrs. Hunter as to the recovery in 1830, cannot alter this case. The defendant, Mr. Alderman Atkins, must pay to the plaintiff the costs of the suit.

Mr. *Agar* asked for the costs of the defendant Roberts.

The MASTER OF THE ROLLS said, he could not give Mr. Roberts his costs. Mr. Roberts was a man of integrity, \*and was no doubt, surprised into this transaction; but [\*131] it was a transaction that ought never to have taken place.

L. C.—1834: *February 11th, 12th, 13th and 14th.*—The defendants J. Atkins and J. P. Atkins presented a petition of rehearing to the Lord Chancellor.

- Sir *Edward Sugden* and Mr. *Sharpe*, in support of the decree.

Mr. *Pepys*, Mr. *Beames* and Mr. *Rennalls* for the appellants.

In addition to arguments on each side, consisting of a commentary on the evidence, and not materially differing from those urged in the court below, it was contended for the appellants, that no decree having been made against the defendant Roberts, who had died since the hearing of the cause, and who was admitted to have been a man of integrity, the charge of conspiracy between Alderman Atkins and his solicitor, which was one of the main foundations of the alleged fraud, had altogether failed. *Griffiths v. Robins*(a) was the only case which had been determined upon the principle that the intervention of an indifferent third person was an indispensable ingredient to give validity to a gift to a person standing in a confidential relation to the donor; and that principle was open to this objection, that many cases of such gifts might occur, where, although no indifferent third person intervened, the intention of the donor might, from other circumstances, be manifested beyond all doubt. But supposing the principle, upon which *Griffiths v. Robins* was decided to be right, there \*was no ground, in the pres- [\*132] ent case, for the objection that the deed was executed without the intervention of a disinterested person, for Roberts had no interest, and the gift came within all the principles upon which the validity of the gift in *Pratt v. Barker*(b) was estab-

(a) 3 Mad. 191.

(b) 4 Russ. 507.

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lished. It was in one respect, indeed, more free from all liability to impeachment than the gift in *Pratt v. Barker*, as in that case the gift was absolute, whereas, in the present case, the donor reserved to himself a power of appointment, and the deed had, consequently, the revocable character of a testamentary instrument. The cases of *Huguenin v. Basely*,<sup>(a)</sup> *Harris v. Tremeneere*,<sup>(b)</sup> and *Nichol v. Vaughan*,<sup>(c)</sup> a case recently decided in the House of Lords, upon an appeal from the decision of the Master of the Rolls in *Winchelsea v. Garety*,<sup>(d)</sup> were also cited for the appellants. For the respondent it was further argued, that the will, having been executed by Admiral Hunter after the deed, operated as an execution of the power of appointment given by the deed, and that the stock comprised in the deed consequently passed to the plaintiff as his residuary legatee; to which it was answered, that it would have been nugatory and plainly inconsistent with the intention of Admiral Hunter to make a gift of the stock to the alderman, subject to a power of appointment, and immediately afterwards to revoke the gift by bequeathing the whole of his property, including the stock to another person. *Twine's Case*<sup>(e)</sup> was cited for the respondent.

*February, 24th.*—The LORD CHANCELLOR delivered the [\*133] following judgment:—\*This cause has excited considerable interest, and not unnaturally, from the peculiarity of circumstances and of characters in which it abounds, as well as the important stake which it involves; not, indeed, on account of the amount of property in question, for that is inconsiderable, but because the reputation of parties in a respectable condition of life, hitherto unimpeached, is, to a certain degree, implicated in the result. The case of the plaintiff cannot be supported without a decision unfavorable to the character of both Mr. Alderman Atkins and the late Mr. Roberts, his solicitor; a decision imputing to the former conduct in the extreme grasping, indelicate, nay, in some degree, dishonorable, if not positively dishonest; and to the latter, a share in the unworthy contrivances of his client, and a lending of himself in his professional capacity to his sordid designs. Every man of ordinary good character has a right to demand, that before he is believed capable of such things, his life should be examined; thus much is due to him from the society in which he lives. But with such general inquiries, courts of justice have no concern. From them he has a right to demand that he shall be charged with specific breaches of duty, or deviations from the line of good conduct; that he shall not be put upon his defence upon vague suggestions, and that he shall

(a) 14 Ves. 275.

(b) 15 Ves. 34.

(c) 1 Clark &amp; Fin. 49.

(d) 1 Mylne &amp; Keen, 253.

(e) 3 Co. 81.

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not be assumed to have swerved from the right path without sufficient and positive proof.

One man will display more delicacy than another; a chivalrous regard for the situation of their neighbors will mark the conduct of some; and some may show themselves regardless of their own interests in circumstances where they could, without incurring any blame, gain a benefit, not so much at the expense of other people, as by taking their share of the bountiful dispositions \*made by a common friend. With all this, [\*134] courts of justice have nothing to do; they can no more set aside a gift from Admiral Hunter to Alderman Atkins, because it would have been generous or delicate in the alderman to have insisted that his friend should prefer his wife or his adopted daughter, than they can decree the alderman to give up the sum which his friend bestowed upon him, for the support of those whom he postponed in the disposition of his property. Unless the circumstances of the transaction are such as make it void upon the ground of fraud or undue influence, the right of the admiral to select the objects of his bounty, and of the alderman to receive his share of it, is incontrovertible, and the court cannot interfere. The various departments of its jurisdiction are not in any portion accurately defined; all the lines within its province, are not precisely drawn; but at least, its outer boundary is sufficiently marked, and separates it plainly enough from the province of the moralist, from the regions under the sway of what are not very accurately termed the duties of imperfect obligation.

There is no dispute upon the rules, which, generally speaking, regulate cases of this description. Mr. Alderman Atkins is either to be regarded in the light of an agent, confidently entrusted with the management of Admiral Hunter's concerns—a person at least, in whom he reposed a very special confidence, or he is not. If he is not to be so regarded, then a deed of gift, or other disposition of property in his favor, must stand good, unless some direct fraud were practiced upon the maker of it, unless some fraud, either by misrepresentation, or by suppression of facts, misled him, or he was of unsound mind when the deed was made. If the alderman did stand in a confidential relation towards him, then the party seeking to set aside the deed may not be \*called upon to show direct fraud, but he must satisfy the [\*135] court by the circumstances, that some advantage was taken of the confidential relation in which the alderman stood. If the alderman stood towards the admiral in any of the known relations of guardian and ward, attorney and client, trustee and *cestui que trust*, &c., then, in order to support the deed, he ought to show that no such advantage was taken, that all was fair, that he received the bounty freely and knowingly on the giver's part, and as a stranger might have done. For I take the rule to be this;

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there are certain relations known to the law, as attorney, guardian, trustee; if a person, standing in these relations to client, ward, or *cestui que trust*, takes a gift, or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered, is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilized men, men who have the benefits of civility, without the evils of excessive refinement and overdone subtlety,

can ever forbid such a transaction, provided the client be [\*136] of \*mature age and of sound mind, and there be nothing to show that the deception was practiced, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others, and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas, in the case of a stranger, it would lie on those who opposed him) to show that he has placed himself in the position of a stranger, that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened, which might not have happened, had no such connection subsisted. The authorities mean nothing else than this, when they say, as in *Gibson v. Jeyes*,<sup>(a)</sup> that attorney and client, trustee and *cestui que trust* may deal, but that it must be at arms length, the parties putting themselves in the situation of purchasers and vendors, and performing (as the court said, and I take leave to observe, not very felicitously, or even very correctly) all the duties of those characters. The authorities mean no more, taken fairly and candidly towards the court, when they say, as in *Wright v. Proud*,<sup>(b)</sup> that an attorney shall not take a gift from his client, while the relation subsists, though the transaction may be not only free from fraud, but the most moral

(a) 6 Ves. 277.

(b) 13 Ves. 138.



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in its nature; a *dictum* reduced in *Hatch v. Hatch*,<sup>(a)</sup> to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of showing that everything was voluntary and fair, and with full warning and perfect knowledge; for in *Harris v. Tremenhoe*,<sup>(b)</sup> the court only held that in such a case a suspicion attaches on the transaction, and calls for minute examination.

\*This appears to me a much more intelligible and [\*137] sound principle than that to which reference is made by the Master of the Rolls in his judgment, and which, in cases of this description, you will sometimes see alluded to—that a third person ought to be interposed. I say you will see it alluded to, for I can nowhere find it established as the rule. Even in *Griffiths v. Robins*,<sup>(c)</sup> to which his Honor refers as the ground of the present decision, and which was a case heard before the same learned judge, it is not so laid down. That was the case of an aged female, stricken with blindness, or nearly so, and reduced by her age and her infirmities to a condition of entire dependence upon a niece, and the husband of that niece to whom she made the gift; and the present Master of the Rolls, then Vice-Chancellor, held that the persons claiming the benefit of the gift were bound to show that it was the result of her own free will, and effected by the intervention of some indifferent person. But it is quite clear that he uses this as one obvious test or criterion of that for which we seek in all these cases; namely, the proof of a voluntary and deliberate act, and not as the only way in which the deed could be shown to be of that description. No man, for instance, can doubt, that if letters had been produced, written by the old woman for a course of time, and without any interference at all; or conversations had been proved, in which her deliberate intention had been expressed, under no agency of influence or deception, the gift would have been good. To hold the contrary would be to say, that the law will not allow a person, dependent on the kindness of others for her comfortable existence, to show her gratitude towards them in the disposal of her property; in other words, to deprive such a person of a power over her \*property, whom it [\*138] most of all imports to possess and to use that power of disposal. In no other case has anything of the kind ever been laid down; and I am of opinion, that it is not laid down even in *Griffiths v. Robins*, unless you take the letter of the judgment against its plain meaning.

In *Harris v. Tremenhoe*,<sup>(b)</sup> where a person unacquainted with business, an invalid, and incapable of attending to his

(a) 9 Ves. 296.

(c) 3 Mad. 191.

(b) 15 Ves. 40.

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affairs, granted to an attorney, who was distantly related to him (son of his grandfather's cousin) and was his own steward, as he had been his father's, several leases for long terms, at nominal rents, it was strongly contended that this attorney and steward, ought to prove that he had explained to the client what he was doing, and to have had a third person interposed; but the court said that there was no authority for holding that he could not take such leases as a pure gift from his employer. "If," said Lord Eldon, "I could find in the answer or evidence the slightest hint that the defendant laid before the testator any account of the value of the premises, that was not perfectly accurate, that would induce me to set the leases aside, whatever the parties intended, upon the general ground that the principal never would be safe if the agent could take a gift from him upon a representation that was not most accurate and precise." Lord Eldon remarks, in another part of the same case, that where an attorney, agent, or steward takes leases without calling in a third person, not that the leases are void, but only that a suspicion attaches on the transaction, which justifies a thorough examination, and prevents the court from giving costs, should the result of the examination prove favorable, and the transaction [\*139] stand. Nothing, it is manifest, can be more wide than this of a rule, that a third person must, at all events, be interposed, and that this is the only criterion of a fair transaction between parties so related to one another.

I have referred to the case of agent, attorney or steward, as the strongest; as the one to which the jealousy of the court is at all times the most watchfully awake; and as the one in which alone I believe, except in *Griffiths v. Robins*, you will find the interposition of third parties mentioned, to the effect of holding the want of such interposition a sufficient ground for setting aside the transaction. Where the relation in which the parties stand to each other is of a sort less known and definite, the jealousy is diminished. A confidential adviser, one who has been generally consulted in the management of the person's affairs, though he may also have been employed specially in his business, does not lie under the same suspicion with an attorney or a steward, or any one who has a general management. In *Pratt v. Barker*,<sup>(a)</sup> the object of bounty was one who had been employed for many years as the surgeon and apothecary of the donor, had received his dividends for him, and had oftentimes been consulted by him respecting the management of his property. Through him the instructions to frame the deed were conveyed to the donor's solicitor, who so far deviated from those instructions as to leave a blank for the donee's name till he saw

(a) 1 Sim. 1; 4 Russ. 507

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his client; and because it was proved that the donor understood the nature of the gift, and had the deed read over and explained to him, the court refused—and without hesitation or even hearing the defendant—to set it aside. In the famous case of *Huguenin v. Basely*,<sup>(a)</sup> remarkable among other things for the display \*of those transcendent talents, and that pure [\*140] taste, by which, among many other accomplishments, Sir Samuel Romilly elevated and adorned the bar, there was a great and general influence exercised of a peculiar kind. It led to the giving up of the whole direction of the party's concerns into the defendant's hands, even to the delivering over of her title deeds by her solicitor. It ended in a conveyance of an estate without consideration; and yet the court held that the proper inquiry was, were her bounties the pure voluntary, well understood acts of her mind? "Did she execute the deeds not only voluntarily, but with all the knowledge of their effect, nature and consequences, which the defendants Basely and the attorney were bound by their duty to communicate to her?"<sup>(b)</sup>

The rule, I think, cannot be laid down much more precisely than I have stated it; that where the known and defined relation of attorney and client, guardian and ward, trustee and *cestui que trust* exists, the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favor may have arisen out of the connection; and that where the only relation between the parties is that of friendly habits, or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness with its effects, and of undue influence exercised or unfair advantage taken, cannot be more rigorously defined. Nor is it, perhaps, advisable that any strict \*rule should be laid [\*141] down—any precise line drawn. If it were stated that certain acts should be the only tests of undue influence, or that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, how easy would it be for cunning men to avoid the one, or protect themselves by means of the other, and so place their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach! If any one should say that a rule is thus recognized, which from its vagueness cannot be obeyed because it cannot well be discerned, the answer is at hand. All men have the interpreter of it within their own breasts; they know the extent

<sup>(a)</sup> 14 Ves. 273.<sup>(b)</sup> 14 Ves. 300.

of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant that others similarly circumstanced should do with regard to themselves.

The circumstances of each case, therefore, are to be carefully examined and weighed, the general rule being of a kind necessarily so little capable of exact definition; and on the result of the inquiry we are to say, has, or has not, an undue influence been exerted—an undue advantage taken?

We may first of all observe, upon the facts of the present case, that the alderman had the confidence of Admiral Hunter to a certain degree, and was accustomed to advise him in certain matters. He had been in habits of intercourse with him both in society and in business for many years, and he was employed as his agent and banker; that is, he acted professionally as his navy agent, received and paid away his money, answering his drafts, and was naturally consulted by him in his money matters from the acquaintance he had with such transactions. That [\*142] he was consulted by him \*beyond this in the disposition of his property, nowhere appears. Many men of business advise their customers or friends as to buying and selling stock, and otherwise dealing with their funds, who would be surprised at being asked how their testamentary dispositions ought to be made; and the habit of consulting upon even all the details of a man's money transactions, would be very far indeed from entitling any banker or agent to give the least hint as to such arrangements.

The two individuals, however, had, besides the intercourse of acquaintance and business, been united in very strict friendship for a period of above forty years. Their ages were very different; but they had been shipmates in former times, and the correspondence as well as all the evidence shows, that there was no one for whom the veteran seaman had so great a regard as his ancient friend and comrade. If this bond may be said to have increased the aldermen's means of influencing him, it opens on the other hand a source of kindness and preference altogether legitimate and pure. Indeed, this consideration goes further; it materially lessens the weight of any remark that might arise upon the exercise of influence acquired by confidential employment; and further still, it even impairs the force of any inference to be drawn from the other relations in which the parties stood towards each other, in proof of the fact that such influence had been used; for it affords an explanation of the favor shown, without having recourse to the supposition that the knowing or crafty counsellor had practiced upon the less wary client.

That the admiral had all along the feelings of kindness for Alderman Atkins to which I have alluded, there is abundant

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evidence. Some of this is to be found in the circumstances attending the *fictum* (as they call it in \*Doctors' [143] Commons); other part relates to the general habits and expressions at former times, and a further part to the still warmer expressions of regard after the execution of the deed in question. It appears, and nothing can be more important to the whole discussion, that many years before, as early as the 23d of October, 1811, he had been minded to make an instrument of some kind to enable the alderman to act in furtherance of his wishes. He says, "I want you to make a deed or will to enable you and yours to act for me hereafter," (he had expressed his satisfaction in a former letter, January 22d, 1811, that Mr. Atkins, junior, the other defendant and trustee in the deed, had become a partner with his father,) "having every confidence in you to execute my further wishes." But he goes on to give some reason, not very distinctly, but yet plainly enough pointing to Mrs. Hunter as likely to be provided for by her father. "She will have something from him, when he is no more; he will not part with anything yet awhile, therefore must take care of self, particularly as we are not likely to have any children." I own it seems difficult to put any meaning upon this, other than as indicating an intention, though not very precise, as to the direction which his bounty should take, and of diverting it away from Mrs. Hunter.

From a letter of the alderman in 1812, it appears that a will had been made and deposited with him, in which he was mentioned in some way. From another in the same month, it is clear that the admiral kept his wife in ignorance of the state of his affairs, with the view of enforcing strict economy; and a subsequent letter shows that he resorted to a somewhat elaborate artifice, with the same design of concealing from her the amount of his property. A letter of the alderman to the admiral, in July, 1817, plainly shows two very important particulars; \*first, that a will had been made in the alderman's [\*144] favor, and, next, that the alderman desired his friend, in the most distinct terms, to make what change he pleased, in the disposition of his affairs, in favor of his wife, and without regarding his (the alderman's) interest, or anything already done to favor him. "If," he writes, "you have a wish to make any alteration in your will in favor of Mrs. Hunter, pray do so without regard to me personally, or to any paper I may hold of yours. Pray, my dear friend, make a new will entirely in any way your mind dictates, and be assured it will be pleasing to me; and in whatever way I can be useful to you, consider me without any personal interest." It is only fair to observe upon this letter, that one cannot easily see anything stronger which the alderman could have done to release his friend, or put him at his ease with respect to the disposition of his property. Had he gone further,

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and declared that nothing should induce him to profit at the expense of the widow, he might have been charged with hypocrisy, and, assuredly, with a man of the admiral's turn of mind, the widow would have gained little by the refusal. It is said, that these letters show a will or wills to have been in the alderman's possession, and the question is asked, "why has he not produced them?" But the letter of July, 1817, to which I have referred, begins with stating, that the alderman had searched, and could not find his friend's papers; and that Mr. Jackson, who appears to have had the care of them, was in France. No one can doubt that they were returned when found; and if not, that they would when produced, have proved to be in Mr. Atkin's favor.

We approach the period, then, of the *factum* with these things established—long and intimate friendship, and much [\*145] favor towards the alderman; a careful \*concealment of the admiral's affairs from his wife; a disposition of his property, in part at least, unfavorable to her, and favorable to the alderman; all this continuing during twelve years previous to the period in question, and all this proved, not by witnesses, but by letters under the hand of the admiral himself, or addressed to and received by him. I will observe on this correspondence, in passing, that it wears a natural air enough on the alderman's part; and that his letters are sufficiently like those of a person in a great concern of business, and who, knowing his friend had left him something of no great amount, was neither very anxious to take it, nor very desirous to go out of his way in order affectedly to reject it. It is fit we now step aside before coming to the *factum*, and mark the state of the admiral's mind.

The bill sets forth, that Admiral Hunter was, ever since an engagement in which he had been nearly hit by a cannon ball, subject to temporary fits of mental derangement; that these increased in frequency and violence during the last twelve years of his life, from 1818 to 1830; that they rendered him, while they lasted, of perfectly unsound mind, and wholly incapable of managing his affairs; that he was seized with one of them in the beginning of July, 1823, the deed in question being executed the 11th of that month; and that the defendant, with the aid of Mr. Roberts, his solicitor, caused him to execute the deed while he was of such imbecile mind and intellects as to be nearly childish, was wholly incapable of managing his affairs, or understanding the nature or purport of any deed; and that at the time of the execution he was also laboring under the influence of the fit of temporary derangement which seized him early in July. It is

not often that a case stated in a bill wears an aspect so [\*146] widely different \*from that opened by counsel at the bar; or that a case opened by counsel is so wholly unsupported by the evidence, as the case I have now abstracted

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from this bill differs from that presented to the court at the bar, and proved by the evidence in the cause. This wide discrepancy, this large departure, is not to be stated as decisive against the plaintiff, but is to be mentioned as a circumstance to the benefit of which the defendant is entitled, and a circumstance of which I must observe he has had no benefit in the court below, any more than he had of the important circumstances proved by the correspondence, and to which I have already adverted.

At what period the plaintiff was advised to shift her ground so entirely, can only be matter of conjecture. That she examined witnesses with the expectation of proving some such case as her bill states is manifest enough. But when publication had passed, and it was seen how the proof had failed in some points, gone beyond all probability, and so in that way failed in other points, and been rebutted by adverse testimony in most respects, she possibly deemed it advisable to abandon the ground of mental incapacity, or rather the somewhat incongruous ground of combined insanity and imbecility, which forms the basis of the bill, and to take the points upon which alone she now relies, and to meet which she did not think proper to direct the attention of the defendants.

The evidence, however, of mental incapacity was given to support the case of the bill, and it partakes largely of the inconsistencies of that case. The principal witness to it is Miss E. Orby Hunter, who stands as nearly as may be in the relation of a party, being the adopted child of the aged pair, and, next to the survivor, the person who may be supposed most disappointed \*by a third of the personalty being given away [\*147] to the defendant. She swears to the admiral being subject to delusions, to insanity, and to fits of violence requiring strong control; but she also says that he was in a state of mental imbecility; all which is not very intelligible in any way, but must, I suppose, be taken to mean that he had fits of insanity, and during their intervals, sunk into an imbecile state. Spring and fall are the seasons at which she represents him as most subject to aberrations; and neither was the time in question. During the whole of May, June and July, 1823, she describes him as laboring under a fit of mental delusion, and also in an imbecile state (for she always mixes these things together,) that rendered him wholly incapable to transact any business, or take care of himself; and she adds, that his state of mind was apparent and visible, and manifested as strongly as possible by his manner, conduct and countenance. This is stated for the purpose of proving that the alderman must have been aware of it; but, by showing that all others who saw him must also have perceived it, the mark is overshot, and the evidence of those others is let in to contradict it. For Miss Hunter swears that it was impossible

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for any person of competent understanding and discernment, who had conversed with the admiral in July, 1823, to have been ignorant of the state he was in. Now many witnesses are produced, on the part of the defendants, who had intercourse with the admiral during that month of July. Mr. Rice and his wife, who happened to be introduced to him for the first time, on the 10th July, 1823, and passed that evening and the next with him, and who refer for the dates, to a journal of occurrences, swear that he was fully competent in every respect; that he played at cards, conversed as rationally as any person in company, and that though he was evidently old (being, indeed, turned [\*148] of ninety-one) his \*faculties seemed quite fresh and vigorous. The servants, Gore and Johnson, who attended him at Mr. M'Duffie's house, where he was on a visit in the same month, and the guests who met him there at dinner, some of whom, as Gray, dined with him on the 10th of July, and were in the habit of seeing him both before and after, speak distinctly to his entire capacity; and the defendants' clerks, Lane, Blacklock and Hollyer, all swear with positive certainty to his transacting business with perfect competency, and to his coming alone for the purpose in the same month. I pass over the more general evidence of capacity, almost equally inconsistent with the case of the bill and the testimony of Miss Hunter, who must, at the very least, be admitted to have mistaken either the year or the month, if she is not in error upon the whole subject matter. The statement of Miss Hunter, that for the last five years, and at times during six years before, he was incapable of knowing the value of money, is not at all decisive, were it true; but it is contradicted. With a case of general insanity or incapacity wholly breaking down, and with a case of such insanity or incapacity, if confined to the month in question, failing as signally, we come to the transaction itself, on the 10th and 11th of July, the days which Mr. Rice and his wife, and Mr. Gray, passed in his society; and who must have sworn falsely, without any motive, if the admiral's state of mind even resembled, however remotely, that which the bill and one of its witnesses represent.

That the admiral was left in town behind Mrs. and Miss Hunter, and that they could not prevail on him to accompany them, is true; but I think it is equally clear that, if they had believed him to be in the state of actual insanity described by Miss Hunter, they would not, on any account, have left him to the [\*149] care of a servant, \*which turns out to have been his own care, for he went alone to Walbrook. It is equally true that from thence he went with Mr. Jackson, the alderman's clerk, to Mr. Roberts, his solicitor, and that this was the professional adviser whom he employed, on the alderman's recommendation, in preparing the deed which was to dispose of part of his prop-



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erty, and the will which was to dispose of the rest. If another solicitor had been employed; possibly, if Mr. Roberts had taken the precaution of preserving, instead of losing, or destroying, the instructions he took down in writing from the admiral's mouth, this case would never have come into court. But the question is, whether that untoward circumstance is sufficient to make this whole proceeding invalid, to effect what seems plainly to have been the fixed purpose of the admiral. Let us look to the other circumstances attending it, and see if they increase or remove the suspicion which arises from the one I have adverted to.

Mr. Jackson, who went with the admiral from Walbrook to Ely Place, is no longer in the alderman's employ; he quitted it seven years ago, three before the admiral's death, and four before this suit commenced. He had been a clerk in the house for eighteen years, and had known the admiral during all that time. He swears that the admiral, on the way to Roberts', said, that he was going to give between the aldermen and others a sum of money or stock, purchased with the accumulations of his long annuities, and that the purpose of his going to Ely Place was to have a deed prepared with this object. When they arrived, he says that the admiral gave instructions to Roberts, who sketched a draft accordingly, and read it to him, and that he approved of it, but changed his mind while it was preparing, and made an alteration, by leaving some person's name out to whom he had intended to give a small sum of money. \*He [\*150] also swears that the deed produced is according to the instructions given, and that he was not surprised at the admiral giving Alderman Atkins part of his money, because he had seen letters from him in which such an intention was expressed. That the admiral could be supposed by any one incompetent to manage his affairs, appears to this witness wholly inconceivable, from the many opportunities he had of intercourse with him in his business concerns.

Mr. Roberts swears distinctly, not only to the admiral's competency, but to his own firm belief "that he was not persuaded or influenced by any person or persons whatsoever, but acted in respect of the deed from his own voluntary inclination and free will, and that it was his own act and deed;" that the instructions proceeded entirely from himself; and that, when he first mentioned his intention in the alderman's favor, Roberts rather endeavored to dissuade him, stating that Mr. Atkins was a rich man, and did not want it; but the admiral answered that he was under great obligations to him, had a great regard for him, and had determined on doing it. When the deed was prepared on the 10th of July, Mr. Roberts gave him a sketch, or short abstract of it, which he took away with him, and, on that day, he was in the society of other friends, wholly apart from the alderman,

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namely, the family of Mr. M'Duffie, to whom he has only left 30%. On the 11th, he returned to Ely Place, when Mr. Roberts read the deed over to him, and explained its nature and purport before he executed it. Mr. Roberts also positively swears that he did not see either the alderman or his son before the execution of the deed, and that he had no conversation whatever with them directly or indirectly upon the subject.

[\*151] \*Between the accounts given of the transaction by Roberts and Jackson, there are only such immaterial variations as are almost always found in the stories told by different persons of the same transaction, when they are telling the truth, and in no concert to deceive by making their recollections exactly agree. This, indeed, is generally deemed a test of honest evidence, and I have always observed that the most experienced judges rely upon it as such. Thus Jackson does not mention the circumstance of Roberts' dissuading the admiral, which, had he been making a tale for his old master, and, in concert with Roberts, swearing for his client, he might easily have done, Roberts' answer to the bill having of course been sworn before Jackson was examined, and having given a similar account of his conversation. So Jackson being described by Roberts as having joined in dissuading the admiral, Jackson gives no such particulars. Nevertheless he confirms Roberts' statement of those attempts to dissuade; for Roberts says that, in answer to his remark that the alderman was a rich man, and did not want it, the admiral said he was under great obligation to him, and Jackson, to show why he was not surprised at the gift, uses nearly the same expressions.

When we consider the slender interest which either of these witnesses can be supposed to take in this matter; that the one was only acting for a client, and the other only giving testimony for an employer whom for five years he had ceased to serve, it must be admitted that were we to believe them perjured upon mere suspicion, uncontradicted as they are by any one, and generally confirmed in such respects as they could be by the oath of the defendants, we should be shaking the confidence reposed in the greater part of the testimony by which the memory of

[\*152] men's transactions is preserved. But if \*Roberts and Jackson are believed, it must be admitted that the admiral, in the entire possession of his faculties, and with a full capacity to manage his affairs and dispose of his property, had formed the deliberate intention of executing this deed in favor of a friend towards whom he entertained extraordinary esteem and gratitude; that he well understood what he was doing; that the deed was prepared from his own express instructions, and read over to him on one day; that he was furnished with an abstract or summary, which he carried home with him; that he returned on the morrow, when it was read over and explained to him, and

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that he then executed it in the presence of two other witnesses, clerks of Mr. Roberts. Can any influence which the alderman may be supposed to have possessed over him invalidate such a deed, without a tittle of proof beyond what is derived from the fact itself of its effect being to give him a preference over near connections, and from the relation of navy agent and the habits of friendship that subsisted between them, those habits furnishing at the same time an explanation of the favor and affection shown, without having recourse to any supposition of undue practices? But if, on such grounds, a deed so prepared and so executed is to be set aside, few assuredly of the acts of men, dealing with their own affairs, are safe, and the law which enables all who are of sound mind to dispose of their property, no longer exists but in name.

That the admiral was not perfectly acquainted at the time with the nature of the transaction in question is incredible, unless Roberts and Jackson have forsworn themselves; and any evidence tendered to prove him at a subsequent period ignorant of what he had done would be extremely inconclusive, even after a short time had elapsed, because his memory at so advanced an age might have failed during the interval. [\*153] But the proof, as far as it goes, is upon the balance the other way. Five days after the execution of the deed and making of the will, he writes to the alderman a letter of much kindness, in which, after saying that he had called to take leave of him, perhaps forever, he observes, that in his will, left, he says, with the alderman, there was a mistake in giving M'Duffie 30*l.* instead of 100*l.* which he ought to have done, from the kindness and gratitude he bore towards his father. The deed certainly contained a gift of 30*l.* to that gentleman. In September following, he writes to the aldermen another letter full of affectionate kindness, and observes that he was not quite satisfied with his will, having had "gout both in his head and his heels at the time, and not well recollecting how it was finished." The alderman supposing he meant his will, though it is contended he used that word to describe the deed, says in reply that it is at Roberts', and he hopes he will make whatever alterations he likes in it without regard to any one, reminding him that he had always desired him to consult his own inclinations alone; in short, using the same language he had employed on the same subject in 1817. The letter mentioning the will is dated the 12th of September, 1823, at Yarmouth, and on the 15th and 16th it is proved by Roberts that the admiral was in Walbrook, and sent for him in order to read over the deed and will; so that if (as the letter imports) he had at all forgotten their contents, he possibly came to town to have any doubts removed. Roberts read both instruments over to him, when he expressed himself quite satisfied,

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and said he desired no alteration to be made in them. Roberts adds that he was then in as sound a state of mind as he had been on the 10th and 11th of July. If ever so many proofs had been brought that afterwards, when his faculties were impaired, \*he had forgotten the contents of those instruments, it would plainly be immaterial to the point in controversy.

In a case of this description, much depends upon the character and prevailing humor of the person who is alleged to have been the dupe of designing men, or to have been worked upon by improper influence. But I am bound to say that here the evidence tends to show the improbability of any such practices succeeding, had they been resorted to. The admiral appears to have been a very different sort of person from what designing men would select for their prey. It is proved by the principal witness for the bill, that he was of an obstinate disposition, more so, indeed, than almost any one we hear of in real life. Far from easily taking a suggestion, or adopting advice given, it was enough to make him do a thing that he was desired to abstain from it; and it is said that the family used to endeavor to lead him upon this principle by a kind of rule of contraries. This account is probably exaggerated, and if it be deemed calculated to meet the evidence that Roberts tried to dissuade him from making the deed, (of which evidence the plaintiff had notice in Roberts' answer,) it must be admitted to be far too great a refinement, and one which at all events cannot be imputed to Roberts without positive proof that he knew of the strange peculiarity deposed to by Miss Hunter, and one on which even then he must have been a very weak man and an unskilful plotter to have acted; for how could he tell that the admiral would not take him at his word, and, acting for once like other men, listen to the exhortation, and thus defeat the object of the supposed conspiracy? It is assuredly not upon any such nice speculations, and such far-fetched refinements, that men act who are engaged in plots of [\*155] this vulgar \*kind. Then can any one doubt that, with all its exaggeration, this account presents us with the picture of a man singularly unlikely to become the dupe of entreaty or the victim of persuasion, and defended, as it were, more than most men, by the peculiar constitution of his mind, from the influence of such artifices?

The question has been asked, Did not the alderman disclose to Mrs. and Miss Hunter the nature of the arrangement which had been made? and if he did not, an inference is drawn against him. So, too, it is said he ought to have apprised Mr. M'Duffie of it. I greatly doubt if such disclosures would have been consistent with propriety and good faith. From his own family he had carefully kept the state of his pecuniary affairs concealed,

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and he had once and again informed the alderman of the stratagems to which he resorted for this purpose. It is by no means clear that the alderman would have been justified in making them acquainted with his friend's whole concerns, including his testamentary dispositions. Had he in like manner committed the information to Mr. M'Duffie, the admiral might have had reason to complain. No person is willing that any one should be made acquainted with the contents of his will, save those whom he chooses himself to let into the secret.

I find that the Master of the Rolls considers it to be established in evidence, that between the preparation and execution of the deed, Mr. Roberts had a communication with the alderman. For this or anything like this you will look in vain through all the evidence tendered here before me. But in that which was read below, the deposition of the plaintiff's solicitor, there is a good deal of important matter, which is clearly not evidence \*at all against Messrs. Atkins. I have read it, and [\*156] there is nothing that I can find which at all proves the communication referred to by his Honor. There are several things stated as having been said by Roberts which are not evidence nor anything like evidence against the Atkinses, but which also in my opinion ought not to have been given in evidence against Roberts himself. Offers leading to a compromise are always, when attempted to be proved, rejected by judges. Communications obtained from a party by an attorney, especially communications from one, who is himself acting as the adverse party's solicitor, are regarded by all judges, when proved by a professional man or his clerk, with an evil eye. That any one should have made the kind of statements imputed to Roberts is eminently unlikely, and they most probably were accompanied by expressions which have escaped the witness' recollection, and which, if given, would have imparted a very different aspect to the whole. But no means were afforded of refreshing Mr. Roberts' recollection on these things. The plaintiff's solicitor, who gives in his examination the account of what Mr. Roberts told him, does not instruct his draftsman to interrogate that gentleman in the bill to these conversations.<sup>(a)</sup> And Mr. Roberts' draftsman could not even frame cross interrogatories to examine Mr. Roberts as to the parts of the conversation which he may have omitted, because what the plaintiff's solicitor was to depose could not be foreseen. Nothing, therefore, less to be depended

(a) After the judgment had been delivered, the junior counsel, who prepared the bill, stated that his instructions contained a statement of the whole of the evidence of the plaintiff's solicitor, and that he had framed the interrogating part of the bill with the omissions in question. This removes from the solicitor the charge of having held back the evidence till he was examined. Note in the Lord Chancellor's judgment.

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upon can well be conceived than such an account so given. It is, I repeat, \*not admissible in evidence at all against Messrs. Atkins; but if it were, as against either of them or Mr. Roberts, were his case now before the court, it could be of no avail whatever, and would not entitle the court to ground anything like an inference upon it. Yet in no other part of the evidence can I find any semblance of a warrant for his Honor's very material assumption that a communication between Roberts and the alderman is proved to have taken place between the time of preparing and executing the deed.

Upon the whole, I am of opinion that the decree must be reversed. It is enough to say, that the circumstances of the case do not warrant the court in ascribing the deed in question to undue influence, or influence improperly exerted over a person either of insufficient understanding, or under the control or management of another—the dupe of his artifices, or the victim of his contrivances, or subjected to his sway. The bill, therefore, must be dismissed. But although there have been imputations of a grave nature upon the principal defendant's character, I will not give the costs, and for this reason—the ill advised conduct of the alderman after the admiral's decease, in repeatedly refusing the particulars sought, unavoidably excited suspicions, and may probably have occasioned the suit. Something of this may be ascribed to the manner in which, from what passed between Mr. Roberts and the plaintiff's solicitor, it may be supposed the demand was made. No improper motive, we are now entitled to say, gave rise to the reluctance. But unfortunately, until the matter was sifted, the suspicions remained; and to this must be added the circumstance of Roberts being the alderman's solicitor; therefore, I consider it a case for dismissing the bill without costs.

[\*158] \*In stating this, I have specified the whole extent of blame, or the indiscretion imputable to the defendants. Their character appears to me, after a careful examination of the evidence, to remain untarnished. It is not enough to fix imputations upon the honesty or the honor of any man, that he might have made a sacrifice of his interest from a high sense of delicacy, or abandoned his rights out of kindness towards others less affluent than himself. Those, may perhaps, have themselves to blame for his struggling against their obtaining the sum in contest, who first directed towards his solicitor the language of invective and menace, and afterwards made the subject of the dispute not so much the pittance at stake as the reputation of the party. And as far as any censure to be cast, or rather any praise to be withholden, because he did not in the earliest stage prevent the gift, or at once abandon it to the family, such considerations belong not to the province of courts of justice—they

1832.—*Piper v. Piper.*

fall within that of the moralist. Yet even there, I know not if any benefit accrues to the interests of sound morals, by confounding together those things which are justly objects of blame, and those things which are only disentitled to applause. By pitching our standard of praise extravagantly high, and treating as delinquents all who have failed to earn the encomiums of romantic excellence, we may truly be said to remove moral landmarks, and to discourage men from attaining that measure of virtue which is within the reach of all, by maintaining no boundary in our estimation, making no difference in our judgments between the actual wrong-doer, and him who only fails to reach those loftier summits which so few can gain.

Decree reversed.

\**PIPER v. PIPER.*

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ROLLS.—1832: 27th July. L. C.—1834: 13th and 18th March.

Where the court directed a deed of appointment as to the respective interests of a father and his children to be made within a limited time, and a deed was executed within the time, containing a power of revocation; it was held, that the intention of the court was defeated, and that the deed was consequently void.

JOHN RAYNER, by his will, dated the 26th of January, 1814, bequeathed the residue of his property after the death of his wife (which took place in his lifetime) to his three grandchildren, Stephen, Sarah and Elizabeth Piper, and their heirs, and in case of the death of any of them, without heirs, to the survivors of them in equal shares, subject, as to such one-third shares, to be applied to the use of them, the said Stephen, Sarah and Elizabeth, in such a way, by settlement, purchase or annuity, or by payment in part or in full, as his executors should appoint; and the testator appointed his son in law, Stephen Piper the elder, and Edward Filde, his executors: and by a paper annexed to his will, and dated the 18th of November, 1820, the testator transferred all debts, due to him from Stephen Piper the elder, to the use of his three grandchildren, to be applied as the said Stephen Piper might think most conducive to their benefit by settlement or otherwise, as he had directed by his will.

Stephen Piper the elder was indebted to the testator, at the time of his death in the sum of 5,600*l.*, 3 per cent bank annuities.

Stephen Piper the younger filed his bill against his father and the other executor, and his sisters, for an account, and obtained an order for the payment into court of his one-third share of the testator's assets.

1832.—Piper v. Piper.

By an order made on the 18th of July, 1831, at the hearing of the cause on further directions, it was, among other [\*160] \*things, declared that the plaintiff, Stephen Piper the younger, and the defendants, Sarah Piper and Elizabeth Piper, the three grandchildren of the testator, took each an absolute interest in one-third of the debt due to the testator from the defendant, Stephen Piper the elder, and in the residuary personal estate of the testator at the time of his death; subject, as to the debt due to the defendant Stephen Piper the elder, to the power of the said Stephen Piper the elder, to settle the whole or any part of each grandchild's share for their respective benefit for life, with remainder to their children; and as to the general residuary estate, subject to the like power of the two executors of the testator, as to the share of each grandchild: and it was further declared, that the share of each grandchild was to be considered as an absolute vested interest in them respectively, unless, on or before the 10th day of November then next, Stephen Piper the elder, as to the debt due from him, and the executors, as to the residuary estate, should deliver to the Master, to whom this cause stood referred, a written execution of the power thereinbefore declared to be vested in them.

No settlement was executed by the executors; but the defendant, Stephen Piper the elder, executed a deed, dated the 5th of November, 1831, whereby he appointed one-third of the debt due from him to the testator's estate, to Stephen Piper the younger for life: with remainder to his children, and reserved to himself a power of revocation.

A petition was presented by the plaintiff, Stephen Piper the younger, praying that the deed of appointment might be declared void, and that the sums paid into court in respect [\*161] of his one-third share of the debt, \*and the residuary estate might be transferred into his name.

Mr. *Bickersteth* and Mr. *Sidebottom*, for the petitioner.

Mr. *Pemberton* and Mr. *Temple*, *contra*.

THE MASTER OF THE ROLLS:—The respective interests of the petitioner and his children depending upon the appointment of Stephen Piper the elder, and being uncertain till such appointment was made, the court, at the hearing, considered it proper that such respective interests should be ascertained within a reasonable time, and therefore directed the deed of appointment to be executed on or before a day named in the order. A deed of appointment has been executed within the time; but the power of revocation reserved by Stephen Piper the elder in that deed, wholly disappoints the intention of the court; and the deed is



1834.—Piper v. Piper.

therefore void, there being no appointment within the sense of the order. The petitioner is entitled according to the prayer of this petition.

1834: *March 14th.*—The defendant, Stephen Piper the elder, presented a petition of rehearing.

Sir *W. Horne* and Mr. *Temple*, for the appellant:—The order made by the court, that the donee of a power, the execution of which was not limited by the testator to any particular period, should execute it by a given day, was a very unusual one. There was nothing in the will creating the power, to compel the donee to execute it at a particular time, or to restrain him from introducing a power of revocation into the deed of appointment, whenever he might choose to execute \*it. [\*162] But supposing the order of the court to be regular, and the power of revocation to be inconsistent with that order, the deed of appointment was only void *pro tanto*. It is not pretended that the objects in whose favor the power is executed are not within the scope of the power; the limitation to the son for life, with remainder to his children, is perfectly good and consistent with the intention of the testator, and the effect of declaring the deed wholly void, will be to defeat the interests so given to the children. A power of revocation is incident to a power of appointment by deed, whether such power of revocation is expressly given or not by the instrument creating the power; and such power of revocation may be exercised as often as the donee of the power chooses, provided he takes care to reserve it to himself in every deed revoking the prior uses; *Adams v. Adams*, (a) *Hele v. Bond*, (b) Whether a power of revocation can be annexed to a power simply collateral has been questioned, upon the authority of *Wall v. Thurborne*, (c) but the author of the *Treatise on Powers* is of opinion, that that point cannot be considered as settled. (d) If the appointment in the present case is void at all, it is void only for the excess; for the appointment in favor of the children is clearly a good execution of the power: *Brown v. Nisbett*, (e) *Ingram v. Ingram*. (g) Lord Hardwicke's decision in *Ingram v. Ingram* is a strong authority in favor of the validity of the present appointment, so far as regards the limitation to the children. In that case a husband had a power under a settlement of appointing among the issue of the marriage; and by his will, after reciting the power, he delegated the power to his wife, and, for want of such appointment, gave the \*prop- [\*163]

(a) Cowp. 651.

(b) Pr. Ch. 474; 1 Eq. Ca. Ab. 342; and Sugd. Pow. App. 4.

(c) 1 Vern. 355.

(e) 1 Cox, 13.

(d) Sugd. Pow. 325.

(g) 2 Atk. 88.

1834.—Piper v. Piper.

erty in equal shares to his two children. Lord Hardwicke held, that the power was not, in its nature, transmissible or capable of being delegated to a third person; but that the gift to the children, in default of execution of the power so delegated, was a good appointment. In *Hamilton v. Royse*,<sup>(a)</sup> Lord Redesdale expressed his acquiescence in the rule, that "where an act is done in execution of a power, though the party goes beyond the power, yet if you can sever what is beyond the power from what agrees with it, you may reject that part of the instrument, and let the appointment stand for the rest."

*The Solicitor-General (Sir C. Pepys) and Mr. Sidebottom, contra*.—The effect of the order of July, 1831, was to give to the plaintiff an absolute interest in his share of the debt due from the father to the testator's estate, unless the father should execute a deed of appointment by a given day. That order has not been appealed from, and, of course, all parties are bound by it. The deed actually executed by the father was manifestly an evasion of the order of the court. The principle upon which the court went in making that order was, that, though it would not unconditionally deprive the father of the power given to him by the testator, yet that power must be exercised within a reasonable time; and as the father had already, by a course of ten years' litigation, prevented his son from having his rights ascertained, the appointment must either be made by a given day, or the son would be absolutely entitled.

The father has evaded the order of the court by executing, within the given time, an appointment which left the rights of the son as unsettled as ever. It is clear, therefore, that the appointment is bad; but it is said that, though [\*164] bad, it may be reformed by the court; or that, though bad in part, it may stand for that portion of it which would have operated as a valid appointment. But the time for raising this question is gone by. Time was of the essence of the order; the father was to do an act by a certain day, or the son's title was to be complete. That act has not been done, and it is now too late to call upon the court to reform a deed which was clearly executed in fraud of the order. In *Ingram v. Ingram*, the court proceeded upon the rule that *delegatus non potest delegare*, and, rejecting that part of the clause in the will which delegated the power, upheld that part which was clearly a good execution of the power. That case, therefore, has no application to the present. In the passage partially cited, on the other side, from Lord Redesdale, that learned judge goes on to say, "But you must see clearly and distinctly what the person had in view, and that he applied his mind in such a way,

(a) 2 Scho. &amp; Lef. 332.

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1834.—*Piper v. Piper.*

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that if he had rightly understood the extent of his power, he would so have executed it." It is only, therefore, when the power is exceeded by mistake, and without any fraudulent design, that the court will give its assistance by rejecting that part of an appointment which is excessive, and letting that which is consistent with the power stand. Tried by that test, the appellant has no claim upon the court for its assistance, inasmuch as the introduction of the power of revocation, which, it is said, may be rejected for excess, was a fraudulent evasion of the order of the court.

Sir *W. Horne*, in reply.

*March 18th.*—THE LORD CHANCELLOR:—It is unnecessary to inquire here, whether or not Stephen Piper the elder was entitled under the will to \*insert a clause of revocation in whatever settlement he might make. There can be no doubt that, generally speaking, the donee of a power may insert such a clause; and it may be said, indeed, that he is always entitled to do so, and that a settlement so framed will be a good execution of the power, unless in cases where the circumstances show that he has not his whole life given him as the period within which the power may be exercised. [\*165]

That there may, however, be cases where no such authority can be implied, or rather, where, contrary to the general rule, it is excluded, cannot admit of a doubt. It may appear with more or less clearness, that an immediate execution, once for all, was intended; that, for example, the maker of the instrument creating the power, intended to make those among whom the donee should appoint independent of him, or that from the nature of the power, it must be intended to be executed at once and forever. This may appear with more or less of clearness, and possibly a question might be raised, whether, in the present case, a power of revocation was meant to be excluded, though my opinion strongly inclines with the court below to hold that it was. The grandchildren are to take their interests, such as the father may appoint, immediately and during his life; and, therefore, it is not easy to see how he should have the power of altering from time to time the proportion of their shares, and the amount of their estates in each; not to mention that here the donee of the power stood in the very peculiar relation of debtor to the estate, and that one of the subjects over which the power is given is the debt due from the donee.

But, however this point might have been determined, it is clearly too late now to institute any such inquiry. The \*posture in which the proceedings stand, precludes it. [\*166] An order was made on the 16th of July, 1831, decla-

1834.—Piper v. Piper.

ring that the grandchildren took absolute vested interests in equal thirds of the father's debt, and of the residue, subject to the father's appointment among them, as to the debt, and subject to the appointment of the executors (the father being one) as to the residue; and the order proceeded to declare, that the interests of the grandchildren should be absolute in both the debt and residue in equal shares, unless, on or before a certain day, (the 10th of November, then next,) the father and the executors respectively delivered to the Master a written execution of the power. There can be no doubt, therefore, that the court construed the power to be one which was to be executed without a clause of revocation. The order, fixing a day certain for the execution, is not intelligible on any other supposition. To direct a party to execute a power at a given time, and yet allow him to insert a clause which would enable him to revoke and alter it as he pleased, and when he pleased, would be nearly a contradiction in terms. The clause inserted is neither more nor less than an evasion of the order of the court, which it renders perfectly nugatory.

Suppose the instrument creating the power had fixed the day when it must be executed, it seems impossible to doubt that revocation would have been excluded, because there could be nothing more contrary to the constitution of the power than such an execution of it. In like manner, I should have no doubt, that if a power is directed to be executed on or before a given day, a clause of revocation may be inserted, but then it can only enable the new appointment under it to be made on or before the given day, that is, the whole execution must be within the limit [\*167] its prescribed; for *Adams v. Adams*, (a) and the other cases, all assume that the new appointment, however often it may be repeated, is always an exercise of the original power. I may, however, add, that though I hold these positions to be clear, I am not aware that there has ever been a decision upon the case I am supposing. The matter has been approached in some of the cases, as *Reresby v. Newland*, (b) perhaps, too, in a case of considerable obscurity, *Harris v. Graham*; (c) and it is not easy to see how some discussion of it was avoided in *Cole v. Wade* (d) at the Rolls, and still more in the same case when it came before Lord Eldon, under the name of *Walter v. Maunde*. (e) But the present is a stronger case, and free from all doubt; for here there is the express and positive order of the court, by a judgment standing unappealed; and, therefore, it seems impossible for his Honor to have held otherwise than he did, namely, that the condition not having been performed by the father, the interests vested absolutely in the grandchildren; that the court

(a) Cowp. 651.

(d) 16 Ves. 27.

(b) 2 P. Wms. 93.

(e) 19 Ves. 424.

(c) 2 Roll. Ab. 329, pl. 12.

1835.—*Brodie v. Bolton.*

having directed the absolute interests to vest, unless, on or before the 10th of November a settlement was executed according to the power, and that settlement not having been executed at all, on or before the 10th of November, the absolute interests vested. I say not executed *at all*, for the executors made no settlement whatever; and Stephen Piper the elder did not, within the time required, make a settlement; that which he did make, being only one, until he should make another. The court said, "You shall appoint within a given time, otherwise your children take absolutely." He does what is tantamount to saying, "I do not appoint \*within that time, but shall do so some day [\*168] or other before I die."

The judgment below must, therefore, be affirmed, and the appeal dismissed with costs.

## BRODIE v. BOLTON.

ROLLS.—1835: 23d July.

The insufficiency of the fund to pay the debts, is the only case in which the plaintiff in a creditor's suit is entitled to his costs as between solicitor and client.

THIS was a creditor's suit, in which a fund remained after the satisfaction of the claims of all the creditors.

\*Mr. *Benson* asked for the costs of the plaintiff, as between solicitor and client, and cited *Tootal v. Spicer*,<sup>(a)</sup> where costs were given to the plaintiffs in a creditor's suit as between solicitor and client, though the fund was insufficient to pay the debts.

Mr. *B. Keen*, for the defendant entitled to the residue, submitted that the inference drawn from the decision in *Tootal v. Spicer*, that costs were given to the plaintiffs as between solicitor and client, notwithstanding the insufficiency of the fund, was incorrect. It was because the fund was insufficient, that the costs were so given; and where the fund was sufficient, as in the present case, the plaintiff was entitled only to his costs as between party and party.

THE MASTER OF THE ROLLS: (b)—The insufficiency of the fund to pay the debts, is the only case in which the plaintiff in a creditor's suit is entitled to his costs as between solicitor and client.

(a) 4 Sim. 510.

(b) Sir C. Pepya.

1834.—Earl of Ripon v. Hobart.

## [\*169] \*EARL OF RIPON AND OTHERS v. HOBART AND OTHERS.

1834: 23d, 24th, 25th and 29th January.

Injunction, at the instance of parliamentary commissioners for cleansing and improving the river Witham and its navigation, and the drainage of the adjacent lands, against the erection or use of a steam engine by parliamentary trustees for draining a particular district, applied for on the ground of probable damage to the banks of the river, into which an increased body of water was thereby expected to be thrown, and also on the ground of apprehended injury to the drainage of the lands within the jurisdiction of the commissioners, refused.

Principles upon which the court proceeds in interposing by injunction between public companies or trustees in cases of apprehended mischief or nuisance.

THE bill was filed by the general commissioners of the Witham navigation, constituted under several local acts of Parliament, for the purpose of draining and improving the fens on both sides of the river Witham, in the districts and parishes therein described, and for restoring and maintaining the navigation of that river from the city of Lincoln downwards to the sea. After setting out the substance of the several acts of Parliament (2 G. III, 48 G. III, 52 G. III and 10 G. IV), and the powers and authorities which were vested in the plaintiffs by virtue of those respective acts, the bill stated, that by another local act (29 G. III, afterwards amended by 2 W. IV), certain persons were appointed trustees for embanking and draining the fens and low lands situate within the three parishes of Nocton, Potter, Hamworth and Bramston, in the county of Lincoln, and were for that purpose authorized to make such banks, cuts, delphs, drains and tunnels communicating with the river Witham, and also to erect such engines and other works, in, through, over and upon the said fens and low lands as should be necessary for draining and preserving the same, without the control of any persons whomsoever, except such control as might be vested in the general commissioners of the Witham navigation, but that nothing in the last mentioned act (the Nocton Drainage Act) was to be construed so as to prejudice or obstruct any works made or to be made by

[\*170] virtue of the \*Witham Navigation Act, or to alter or invalidate the powers of the commissioners under that act.

The bill then stated that the defendants, the trustees of the Nocton drainage, intended, and were proceeding to erect and use a steam engine, in the parish of Nocton, for the more effectually draining and preserving the low lands within the embankments from injury by floods, by throwing the water out of such lands into Nocton delph; and that the erection of such steam engine would do great and irreparable injury to the banks of the river Witham at the parts therein mentioned, (being the banks which

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1834.—*Earl of Ripon v. Hobart.*

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the plaintiffs, as such commissioners as aforesaid, were bound to preserve and keep in repair,) and would, to a great extent, break down and destroy the same; whereby the low lands and fens, the drainage of which was provided for by the aforesaid acts or the 2 and 52 G. III, and was under the jurisdiction of the plaintiffs, would be flooded and overflowed, and great and irreparable injury would be done thereto. The bill then charged that windmills only, and no other engines had theretofore been used for throwing off the water from the lands and fens under the jurisdiction of the Nocton trustees, into the delphs and dykes communicating with the river Witham; and that by reason of the variable nature of the wind and the small lift of the windmills, the periods at which such windmills could be effectually used were very uncertain, and generally of short duration; and that it had been found in consequence, that on the occasion of floods, the additional body of water thrown into the river Witham by the use of such windmills had been thrown into the same by slow degrees and during a protracted period of time, so as to cause only a small increase of pressure beyond the usual pressure on its banks: and it charged that by the erection and use of a steam engine, the additional body of \*water forced [\*171] into the Witham from the said low lands, would be forced into the same in a much shorter space of time, and in a far more uninterrupted and continuous manner, whereby the pressure on the banks of the river would be very greatly increased, and their strength and stability greatly damaged or endangered. The bill prayed that the defendants, the trustees of the Nocton drainage, might be restrained by injunction as well from erecting as from using any steam engines for the purpose of throwing off the water from or out of the low lands within the three parishes aforesaid, or parts thereof, into the delph or drain called the Nocton delph, or into any other delph, drain or channel communicating directly or indirectly with the river Witham; or at any rate from using any steam engine for the purpose aforesaid, so as in any manner to injure the banks of the said river, or to injure or interfere with the draining and improving of the low lands and fens mentioned and comprised in the act of Parliament constituting the commissioners of the Witham navigation, or any works erected or performed by such commissioners.

A motion was now made in the terms of the prayer of the bill. Very voluminous affidavits were filed on both sides, chiefly with reference to the probable effect of the proposed working of a steam engine on the draining of the lands lying lower down the Witham, and its effect in throwing an increased body of water into the river, and thereby augmenting the pressure upon its banks. The general character and purport of the affidavits are stated in the judgment.

1834.—*Hunter v. Atkins.*

upon can well be conceived than such an account so given. It is, I repeat, \*not admissible in evidence at all against Messrs. Atkins; but if it were, as against either of them or Mr. Roberts, were his case now before the court, it could be of no avail whatever, and would not entitle the court to ground anything like an inference upon it. Yet in no other part of the evidence can I find any semblance of a warrant for his Honor's very material assumption that a communication between Roberts and the alderman is proved to have taken place between the time of preparing and executing the deed.

Upon the whole, I am of opinion that the decree must be reversed. It is enough to say, that the circumstances of the case do not warrant the court in ascribing the deed in question to undue influence, or influence improperly exerted over a person either of insufficient understanding, or under the control or management of another—the dupe of his artifices, or the victim of his contrivances, or subjected to his sway. The bill, therefore, must be dismissed. But although there have been imputations of a grave nature upon the principal defendant's character, I will not give the costs, and for this reason—the ill advised conduct of the alderman after the admiral's decease, in repeatedly refusing the particulars sought, unavoidably excited suspicions, and may probably have occasioned the suit. Something of this may be ascribed to the manner in which, from what passed between Mr. Roberts and the plaintiff's solicitor, it may be supposed the demand was made. No improper motive, we are now entitled to say, gave rise to the reluctance. But unfortunately, until the matter was sifted, the suspicions remained; and to this must be added the circumstance of Roberts being the alderman's solicitor; therefore, I consider it a case for dismissing the bill without costs.

[\*158] \*In stating this, I have specified the whole extent of blame, or the indiscretion imputable to the defendants. Their character appears to me, after a careful examination of the evidence, to remain untarnished. It is not enough to fix imputations upon the honesty or the honor of any man, that he might have made a sacrifice of his interest from a high sense of delicacy, or abandoned his rights out of kindness towards others less affluent than himself. Those, may perhaps, have themselves to blame for his struggling against their obtaining the sum in contest, who first directed towards his solicitor the language of invective and menace, and afterwards made the subject of the dispute not so much the pittance at stake as the reputation of the party. And as far as any censure to be cast, or rather any praise to be withholden, because he did not in the earliest stage prevent the gift, or at once abandon it to the family, such considerations belong not to the province of courts of justice—they



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1832.—Piper v. Piper.

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fall within that of the moralist. Yet even there, I know not if any benefit accrues to the interests of sound morals, by confounding together those things which are justly objects of blame, and those things which are only disentitled to applause. By pitching our standard of praise extravagantly high, and treating as delinquents all who have failed to earn the encomiums of romantic excellence, we may truly be said to remove moral landmarks, and to discourage men from attaining that measure of virtue which is within the reach of all, by maintaining no boundary in our estimation, making no difference in our judgments between the actual wrong-doer, and him who only fails to reach those loftier summits which so few can gain.

Decree reversed.

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\*PIPER v. PIPER.

[\*159]

ROLLS.—1832: 27th July. L. C.—1834: 13th and 18th March.

Where the court directed a deed of appointment as to the respective interests of a father and his children to be made within a limited time, and a deed was executed within the time, containing a power of revocation; it was held, that the intention of the court was defeated, and that the deed was consequently void.

JOHN RAYNER, by his will, dated the 26th of January, 1814, bequeathed the residue of his property after the death of his wife (which took place in his lifetime) to his three grandchildren, Stephen, Sarah and Elizabeth Piper, and their heirs, and in case of the death of any of them, without heirs, to the survivors of them in equal shares, subject, as to such one-third shares, to be applied to the use of them, the said Stephen, Sarah and Elizabeth, in such a way, by settlement, purchase or annuity, or by payment in part or in full, as his executors should appoint; and the testator appointed his son in law, Stephen Piper the elder, and Edward Filde, his executors: and by a paper annexed to his will, and dated the 18th of November, 1820, the testator transferred all debts, due to him from Stephen Piper the elder, to the use of his three grandchildren, to be applied as the said Stephen Piper might think most conducive to their benefit by settlement or otherwise, as he had directed by his will.

Stephen Piper the elder was indebted to the testator, at the time of his death in the sum of 5,600*l.*, 3 per cent bank annuities.

Stephen Piper the younger filed his bill against his father and the other executor, and his sisters, for an account, and obtained an order for the payment into court of his one-third share of the testator's assets.

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1832.—*Piper v. Piper.*

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1824.—Earl of Ripon v. Hobart.

not bound to prevent any steam engine from being erected, but only to restrain such a use of it as destroyed the navigation.

If, however, that ground be denied or deemed insufficient, and if this mischief be of a kind which consists in the erection of the engine, and not in the mode of working it, it follows that it must be so treated throughout. Have the plaintiffs so treated it? Taking that, which is of necessity their view of the question, have they so proceeded as to give them a right to the assistance of this court? It appears to me that they have not.

[His Lordship then stated the several communications which had passed between the Nocton trustees, and the commissioners of the Witham Navigation, and the different steps taken by the latter with a view to oppose the intended erections, and proceeded:]

The result of the whole was, that the question could not come on for discussion in this court before the 20th of December last, after considerable progress had been made in the works, and sums of money been expended upon them, independent of contracts being entered into at the earlier period. The danger apprehended in the case of the *Birmingham Canal Company v. Lloyd*, (a) was one of a very serious nature—that of draining off the water from a great reservoir of the canal: and yet Lord Eldon refused the injunction, leaving the company, as he said, “to take their chance at law,” because they had delayed coming to the court till two years after notice from the defendants. Here,

indeed, the delay was only nine months; but there was [\*179] a counter-notice in that \*case as well as in this, and it made no difference in the consideration of the court as to the party's laches. Lord Eldon there added, “they must establish their right to damages at law before I ought to grant this injunction.” So that he held their delay to have been sufficient to deprive them of the preventive relief altogether, inasmuch as the damage must, in great part, have been done before they could obtain their verdict, and again come to this court. But the conduct of the plaintiffs here gives rise to the further remark, that in a case of this kind, where the application is not against an admitted nuisance, but against a work which may or may not be noxious according to circumstances, the party alleging mischief has no middle course between coming in the very first instance, and waiting until he can satisfy the court, by a verdict at law, that he is right both as to his title and as to the mischief.

In considering more generally the question which is raised by the present motion, I certainly think we shall not go beyond what both principle and authority justify, if we lay down the rule respecting the relief by injunction, as applied to such cases,

(a) 18 Ves. 515.

1834.—*Earl of Ripon v. Hobart.*

to be this: If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained, is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though, in particular cases, an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question.

\*The distinction between the two kinds of erection or [\*180] operation is obvious, and the soundness of that discretion seems undeniable which would be very slow to interfere where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property which are *prima facie* harmless, or even praiseworthy, is equally manifest; and it is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it, even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. All that has been said in the cases where this unwillingness has appeared, may be referred to in support of the proposition which I have stated; as in *The Attorney-General v. Nichol*,<sup>(a)</sup> *The Attorney-General v. Cleaver*,<sup>(b)</sup> an anonymous case<sup>(c)</sup> before Lord Thurlow, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction, in the case of what we have been regarding as eventual or contingent nuisance. But some authorities approach very near the ground upon which I have relied: Lord Hardwicke, in *The Attorney-General v. Doughty*,<sup>(d)</sup> speaks of a *plain case* of nuisance as contradistinguished from others, and as entitling the court to grant an injunction before answer.

Lord Eldon at one time<sup>(e)</sup> appeared to think that there was no instance of an injunction to restrain \*a [\*181] nuisance without a trial. But though this cannot now be maintained, it is clear that in other cases where there appeared

(a) 16 Ves. 338.

(d) 2 Ves. sen. 453.

(b) 18 Ves. 211.

(e) *Attorney-General v. Cleaver*, 18 Ves. 220.

(c) 1 Ves. jun. 140.

1834.—Earl of Ripon v. Hobart.

to be a doubt, as in *Chalk v. Wyatt*,<sup>(a)</sup> the injunction was said only to be granted because damages had been recovered at law.

The course which has been pursued at law, with respect to different kinds of obstructions and other violations of right, furnishes a strong analogy of the same kind. Lord Hale, in a note to Fitzherbert's *Natura Brevium*,<sup>(b)</sup> speaking of a market held in derogation of a franchise, says, that if it be kept on the same day it shall be intended a nuisance, but if it be on another day it shall be put to issue whether it be a nuisance or not: and the case of *Yard v. Ford*<sup>(c)</sup> seems to recognize the same distinction.

Upon this view of the question, then, it seems impossible to grant the injunction. But, advertng to the circumstances of the case, the conduct of the parties both before and since the cause came into court, and the conflict of opinion among the professional men, which the evidence unquestionably discloses, the inclination of the court would naturally be this, independently of the objection to which I have mainly adverted. There can be no satisfactory way of determining on which side the true opinion lies without actual experience. A trial at law might, probably would, by the examination of witnesses, and the view afforded to the jury in the company of skilful and experienced persons, throw important light upon the subject. Nevertheless, the only means of attaining certainty, amidst the discrepancy of learned opinions, is actual experience. If the waiting for that [\*182] might, by any proximate \*possibility, occasion such irreparable and extensive damage as some of the witnesses speak of, the inducement would be strong to grant an injunction in the meantime. But, upon the whole result of the evidence, there does not appear to be such a reasonable ground of apprehension as imperatively to call for this course here. If that be so, the consequences of granting the injunction are then to be regarded. These are by no means to be compared with the consequences of shutting up a colliery or other mine which may be flooded, or a trading concern which may, from its nature, be destroyed forever, if suspended for a month. Nevertheless they are not to be put out of view. The engines have been erected, and the order would prevent them from working, and that too after the money had been invested in their construction, in consequence of the plaintiffs having from October to February done nothing but repeat a notice, and nothing at all from that notice till June, although aware in September of the intention to build the engines, and not apprised afterwards by any act or any communication that the intention was abandoned.

All this leads to the conclusion that things should be suffered to continue as they now are.

(a) 3 Mer. 688.

(b) 1834, n. b.

(c) 2 Saund. 172.

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 1834.—Hodgson v. Shaw.
 

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His Lordship concluded his judgment by refusing the motion, and by recommending that the parties should agree to refer the matters in question to some individual of respectability and skill resident on the spot, to whom might be entrusted the discretion of directing at what times the working of the proposed new machinery should be relaxed or suspended, and who might be the person to determine whether the application to the court should be renewed.

A subsequent application for an issue was also refused.

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\*HODGSON v. SHAW.

[\*183]

1834: 15th and 17th March; 15th April.

A. and B. executed a joint and several bond, to secure a sum of money with interest to W.; subsequently to the deaths of A. and W., the executors of W. obtained from B., as principal, and from C. as surety, another bond to secure a part of the money then due on the original bond, with interest. No payments were ever made in respect of the first bond, but after C.'s death the second bond was paid off out of C.'s estate, and his representatives thereupon procured the original bond to be assigned to them: Held, on a suit to administer the estate of A., that C.'s representatives were entitled, by virtue of the assignment, to rank as specialty creditors of A.'s estate, in respect of the payments made by C. or his estate on the second bond, to the extent of the penalty in the assigned bond.

On the 14th of February, 1812, a joint and several bond to secure a sum of 2,220*l.* and interest, with a penalty of double the amount, was executed by Richard Shaw and Henry Shaw as principals to one Wilkinson. On the 17th of March, 1813, Wilkinson died, and the death of Richard Shaw took place in the month of August following. In January, 1816, a sum of 2,523*l.* was due to the estate of Wilkinson for principal and interest upon the bond; and applications having been then made by Wilkinson's executors for payment of that sum, Henry Shaw prevailed upon John Whaley to join with him in executing to the executors, on the 22d of the same month, another bond for the sum of 2,420*l.*, being part of the said sum of 2,523*l.*, due on the bond of February, 1812, and in which new bond Henry Shaw was the principal debtor, and John Whaley a surety. Whaley died in July, 1818, having previously made some payments on account of the bond of January, 1816, to the executors of Wilkinson; and, after his decease, other payments were, from time to time, made by his representatives out of his estate, in further discharge of what was due in respect of that bond; and in consideration of those payments, which amounted in the whole to the sum of 2,937*l.*, the executors of Wilkinson, by an indenture dated the 24th of June, 1830, reciting, that they had received from Whaley and his estate the sum of 2,937*l.*, in part

[\*184] discharge of the moneys due on the bond of \*January, 1816, and that no payment had ever been made by Richard Shaw and Henry Shaw, or either of them, on account of the bond of February, 1812, and that the same was still subsisting, and an available security at law for the full amount of principal and interest expressed to be thereby secured; and further reciting, that the parties thereto were advised that the estate of Whaley was entitled to the benefit of the bond of February, 1812, for recovering the sum of 2,937*l.* so paid by or by the estate of Whaley, as such surety for Richard Shaw and Henry Shaw as aforesaid, but subject, in the first place, to the right of the said executors to recover, by means thereof, so much money as was the difference between the said sum of 2,937*l.* and the full amount of principal and interest secured by the bond of February, 1812, and that it had been therefore agreed that the said executors should assign the last-mentioned bond in manner and for the purposes thereafter expressed; they, the said executors, did thereby assign and transfer unto John Harrison, his executors, administrators and assigns, the said bond of February, 1812, and all the sums of money thereby secured, upon trust, in the first place, to pay to them two sums of 94*l.* 10*s.* and 325*l.* 10*s.*, with interest and costs as therein mentioned; and upon further trust to pay to Whaley's widow a sum which she had advanced to the said executors out of her own moneys, as therein mentioned; and as to the residue or surplus thereof, upon trust for the personal representatives of Whaley, for their own use and benefit.

Under the decree, which was made in a creditor's suit for the administration of the estate of Richard Shaw, the Master found the facts before mentioned with respect to these two bonds; and the report having been confirmed, one of the questions discussed at the Rolls upon further direction was, whether the

[\*185] personal representatives \*of John Whaley were entitled, by virtue of the assignment which had been made of Wilkinson's bond to a trustee, for them to rank as specialty creditors against Richard Shaw's estate, to the amount of the sums found due to their testator's estate, in respect of payments made on account of the bond of January, 1816, in which he had been surety for Henry Shaw.

The Master of the Rolls, having decided (among other things) that the personal representatives of John Whaley were not entitled to rank as specialty creditors against the estate of Richard Shaw for any of such sums, a petition of appeal was presented against his decision.

*The Solicitor-General (Sir C. Pepys), Mr. Spence and Mr. J.*



1834.—Hodgson v. Shaw.

*Russell*, in support of the appeal:—The judgment of his Honor was founded on a mistaken application, or rather extension, of the doctrine laid down by Lord Eldon in *Copis v. Middleton*.<sup>(a)</sup> It is not sought, in the least degree, to impeach the authority of that case, of which, however, it may be observed, that it was the first to introduce in terms any exception to the generality of the rule established by so many earlier cases, that a surety paying off his principal's debt is entitled, as against that principal, to all the remedies of which the creditor might have availed himself. The facts found by the Master totally exclude the application of that exception in the present instance. The result of the finding is, that the whole of the debt due to Wilkinson's estate, in respect of the bond of February, 1812, has been paid by Whaley or his estate, except a sum of 430*l.*; and that it has been paid in discharge, not of the original bond, but of a new obligation, \*by which Whaley made himself substantially a [\*186] surety for the Shaws, the debtors in the original bond to Wilkinson. That bond still remains existing and in full force, and the right to sue upon it has been purchased by Whaley's representatives, who, in virtue of the assignment they have obtained, are now entitled to use it against Richard Shaw's estate for their own reimbursement.

This is, in truth, no more than the ordinary case of a stranger who pays off what was due upon a bond, and procures the instrument to be assigned to him by the creditor for his indemnity. The effect of such an assignment, in placing the assignee exactly in the situation of the original creditor as against his debtor, has never been questioned. The decision in *Copis v. Middleton* was expressly rested on the ground that the bond, in respect of which the surety there claimed to be a specialty creditor, was extinguished by the payments he had made. *Jones v. Davids*,<sup>(b)</sup> which carried the doctrine a step further, determined, that even an assignment of the bond executed to a trustee for the surety at the time when the surety pays off the debt, will not keep alive the instrument so as to make the surety in equity a specialty creditor of his principal. But neither of these decisions touches the present question; for the payments by Whaley and his representatives are expressly found to have been made in respect of a distinct obligation, viz., the bond of January, 1816; so that the case falls directly within the principle of the exception stated by Lord Eldon in *Copis v. Middleton*, where his Lordship says, "If, at the time a bond is given, a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee."

<sup>(a)</sup> 1 T. & R. 224.<sup>(b)</sup> 4 Russ. 277.

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[\*187] \*Notwithstanding those payments, therefore, the bond of February, 1812, to Wilkinson, remained a valid and subsisting security; an action might have been brought upon it, and a judgment recovered, by Wilkinson's executors against the representatives of Richard Shaw. The latter could neither have pleaded that the bond was paid at the day, nor have availed themselves of the plea of *solvit post diem*, which is only given under the special provisions of the statute of Anne (4 Ann. c. 16, sec. 12,) and which clearly could not have been a good plea under the statute, to be supported by the evidence in this case: *Hudson v. Stalwood*.(a) The case referred to in *Viner*,(b) shows that the fact of the debt having been satisfied by a surety, was, before the statute, a matter of utter indifference as between the co-obligor and the obligee. In *Parsons v. Bridglock*,(c) which was approved by Sir W. Grant in *Wright v. Morley*,(d) the surety having satisfied the debt, was held entitled to have the judgment against the bail assigned to him.

Sir W. Horne and Mr. Duckworth, *contra*.—The judgment of his Honor proceeded on the well established principle, that the assignee of a bond stands in no better situation than the assignor; and can, therefore, claim no more than the assignor could have claimed. Now, it is perfectly clear that after the sum of 2,937*l.* had been paid off by Whaley or his estate upon the second bond, the executors of Wilkinson could not, at least in equity, have recovered payment, upon the original bond, of more than the trifling balance of 430*l.*, which still remained unsatisfied at the time of the assignment; and their assignees must of course take it \*subject to the same equity. The second bond was not, properly speaking, a collateral security, but was rather given by way of substitution *pro tanto* of the first; and though the first was not extinguished at law, it was gone in equity, to the extent of the payments recovered under the second, the instant those payments were made. The mere fact, that here the first bond was kept alive as a subsisting legal instrument, cannot make a difference any more than does the delivery of a bond to the surety who pays off the debt, or the assignment of it to a trustee for his benefit; circumstances which have been determined, in *Copis v. Middleton*(e) and *Jones v. Davids*,(g) in no degree to improve the situation of the surety. The principle of those two cases goes the full length of the decision now sought to be reversed; for the whole of the debt, to secure the repayment of which to Whaley's estate the assignment was taken,

(a) Ca. Temp. Hardwicke, 133.

(b) 16 Vin. Ab. tit. Obligation, (P.) pl. 19.

(c) 2 Vern. 608.

(e) 1 T. &amp; R. 224.

(d) 11 Ves. 12.

(g) 4 Russ. 277.

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had been already paid off, and was gone at the time. It is urged that Whaley was not a surety in the first bond, and, therefore, that his representatives have now a right to consider it as a collateral security for what his estate has paid upon the second: but this is a distinction without a difference. The two obligations together constituted but one security, in which the Shaws were the principal debtors; and Whaley, though to a limited amount only, was surety for them; and the latter, by discharging the burden to the extent of his suretyship, in effect destroyed the original obligation to that extent. An assignment of the bond of 1816, could not entitle Whaley's representatives to claim as specialty creditors of Henry Shaw; and the difference between the situation of Henry and Richard is, in this respect, merely formal.

\*The LORD CHANCELLOR, after stating the circumstances out of which the question arose, gave judgment as follows:—The principles upon which *Copis v. Middleton*(a) rests are sound and unquestionable; and it is only upon a narrow and superficial view of the subject, that the decision has ever been charged with refinement or subtlety. The ground of the determination was clear; it was founded in the known rules of law, and determined in strict conformity with the doctrines of this court.

The only case in the books really inconsistent with it was *Parsons v. Briddock*,(b) where Lord Cowper decreed, that a judgment which had been entered up against the bail should be assigned to the sureties of the bail, to reimburse them what they had paid on account of their obligation; and this case is recognized, but to a certain extent only, by Sir William Grant in *Wright v. Morley*.(c) The other cases were either wide of the point, or not finally determined. Thus *Gaynor v. Royner*, before Sir T. Sewell, though considered by Sir Thomas Plumer, in *Robinson v. Wilson*(d) as ruling that a surety paying off a specialty debt is a specialty creditor of the principal, decides no such point; for that was the case of an assignment decreed to be made of a mortgage, which had been given by the principal debtor as a collateral security for a portion of the debt, and which plainly continued, and was a subsisting security after payment of the bond. Then *Hotham v. Stone*,(e) decided at the Rolls in 1810, and not reported, was appealed, and apparently, never finally determined; and Sir Thomas Plumer desired *Robinson v. Wilson* to stand over until \*the result of the appeal [\*190]

(a) 1 T. &amp; Russ. 224.

(b) 2 Vern. 608.

(c) 11 Ves. 12.

(d) 2 Mad. 434.

(e) 1 T. &amp; Russ. 226, note.

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should be known. Although, therefore, the way could not be said to have been prepared for *Copis v. Middleton* by any former decision, there was no body of authority against it, and the principles on which it was decided appear to be clear.

When a person pays off a bond in which he is either co-obligor or bound *subsidiarie*, he has at law an action against the principal for money paid to his use, and he can have nothing more. The joint obligation towards the creditor is held to give to the principal notice of the payment, and also to prove his consent or authority to the making that payment. This is necessary for enabling any man who pays another's debt to come against that other, because a person cannot make himself the creditor of another by volunteering to discharge his obligations. But beyond this claim, which is on simple contract merely, there exists none against the principal by the surety who pays his debt; nor, when the matter is closely viewed, ought there to exist any other. The obligation by specialty is incurred not towards the surety, even in the event of his paying, but only towards the obligee; and there is no natural reason why, because I bind myself under seal to pay another person's debt, the creditor requiring a security of that high nature, I should therefore have as high a security against the principal debtor. If I had chosen to demand it, I might have taken a similar obligation when I became so bound; and if I omitted to do so, I can only be considered as possessing the rights which arise from having paid money for him which I had voluntarily, and without consideration, undertaken to pay.

The case standing thus at law, do considerations of equity make any alteration in its aspect? The rule here is [\*191] undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract or *quasi* contract; unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court in this respect was luminously expounded in the argument of Sir Samuel Romilly in *Craythorne v. Swinburne*; (a) and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval. "A surety," to use the language of Sir S. Romilly's reply, "will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the

(a) 14 Ves. 160.

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1834.—Hodgson v. Shaw.

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creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor."(a) I have purposely taken this statement of the right, because it is there placed as high as it ever can be placed, and yet it is quite consistent with the principle of *Copis v. Middleton*.

Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty, or any remedy on any specialty, after the bond is gone by payment? The surety may enforce any security against the debtor which the creditor has; but, by the supposition, there is no security to enforce, for the payment has extinguished it. He has a right to \*have all the securities transferred to [\*192] him; but there are, in the case supposed, none to transfer; they are absolutely gone. He may avail himself of all those securities against the debtor, but his own act of payment has left none of which he can take advantage. Living the principal debtor, the surety could only bring *indebitatus assumpsit* for the money he had paid to that principal's use. The death of that debtor cannot clothe him with a higher title. Living the debtor, the creditor could not have assigned the bond on payment by the surety; for there was no longer anything to assign. The death of the debtor cannot surely operate a reviver of the specialty, enable the creditor to assign it, or the court to hold it assigned in equity, and empower the surety to sue upon it the executors or administrators of him who, had he chanced to survive, never could have been sued, except upon the money counts in an action of *assumpsit*. Observe the consequence that would have followed from any other principles, while the law of debtor and creditor continued as it was till the recent alteration, and when landed estates were not real assets for payment of simple contract debts. If the principal debtor continued alive, the surety could not in any way touch his real estates, except through the medium of a judgment; but if he happened to die, his real estates became assets, although the law had never been changed. There can be no doubt, therefore, with respect to the principle of *Copis v. Middleton*; and Lord Eldon expressed himself without any hesitation in that case, though pressed with the authority of Sir William Grant in *Hotham v. Stone*, upon which he remarked that the case had been appealed and compromised without coming to an argument.

But it is most material to the question now before the court, to mark and keep distinctly in mind the grounds of the de-

(a) *Ibid*, 162.

1834.—Hodgson v. Shaw.

[\*193] cision in *Copis v. Middleton*; and it is for this \*reason that I have deemed it necessary to state them so particularly; for they are such as do not exist at all in the case at present under consideration.

Suppose that the debt in *Copis v. Middleton* had been paid, not by the surety bound in the same obligation with the principal, but by a third party, who had by a separate instrument made himself liable for the same debt; it is clear that the reason upon which the decision rested, would have failed altogether, while every one of the general arguments drawn from the rights of a surety to stand in the shoes of the creditor, would have risen up against the decision with a force not to be resisted. Now, that is the present case. John Whaley became bound in the year 1816, with Henry Shaw, as the surety of Richard Shaw, the principal debtor. In the obligation entered into in that year, he became bound by an instrument executed separately from the original bond; and he and his representatives subsequently paid off the debt which he had then incurred, and paid it off in discharge of his own obligation. The debt on the original bond being thus satisfied as far as the creditor was concerned by the second bond being paid off, the original bond of 1812 was assigned in trust for the estate of John Whaley, which had thus discharged the debt.

It cannot in this case be contended, that the specialty was gone; that the bond of 1812 was paid off and at an end, and that in the year 1830, there remained nothing to be assigned. The bond of 1812 subsisted to the effect of being assignable; the bond of 1816, indeed, was paid by John Whaley, and could not be assigned to him or his representatives, so as to give him a claim as a specialty creditor against Henry Shaw's estate. As against that estate, Whaley could only claim on the *indebitatus assumpsit* at law, and in equity, he could only stand as a simple

[\*194] \*contract creditor; for there was no longer anything capable of assignment; the security was gone by being paid off, but the security of 1812, in which the transaction had its origin, remained; the payment, which of necessity, must be attributed to the bond in which John Whaley was an obligor, could not extinguish that to which he was a stranger; there was something consequently to assign, and an assignment was in fact executed. *Copis v. Middleton* was the case of John Whaley or his representatives, claiming as specialty creditors against Henry Shaw or his estate; and according to the rule in that case, they would have claimed in vain. *Copis v. Middleton* was not the case of John Whaley, or his estate paying his separate bond, and taking an assignment of a formerly executed, and still subsisting security, viz., the bond of 1812, and no one of the reasons which decided that is applicable to this case.

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1834.—Hodgson v. Shaw.

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Thus, to try how far these reasons apply, a surety has a right to all the securities in force against the principal debtor. John Whaley or his representatives, therefore, have a right to the benefit of the bond given by Richard Shaw, because that is still in force. In *Copis v. Middleton*, the court admitted the surety's right, as against the principal debtor, to stand in the shoes of the creditor, but said there were no shoes for him to stand in, because the bond, having been being paid off by a party to it, was gone at law. Here there are such shoes; the bond of 1812 is not paid off, and it has been formally assigned by the creditor to John Whaley's representatives.

It is difficult to suppose a ground for excluding John Whaley's representatives in this case, that would not deprive any purchaser of a bond of the right to what he had bought, or at least prevent a collateral surety from becoming \*purchaser [\*195] of the obligation which he had guaranteed by a separate instrument. By paying off his own bond and obtaining an assignment of the bond of 1812, John Whaley and his representatives had become purchasers of the latter specialty, and stood in the relation of assignees of the debt. It is true, that if the surety had paid off the bond in which he was bound, he could have no assignment; but that is, because in paying at once his own debt and the principal's, he had extinguished the obligation.

Observe how clearly the principles of pleading at common law keep the cases distinguished. When the bond of John Whaley and Henry Shaw was discharged by the payment made by Whaley, if an action had been brought by Whaley against Richard Shaw on the bond of 1812, payment could not have been pleaded; for the obligor must have pleaded, that he, or some one by his authority and on his behalf, had paid the debt for him; nor could acceptance by the obligee in satisfaction be pleaded; for that must also be acceptance in satisfaction of the obligation, and it is clear that the payment was made, and the satisfaction given in respect, not of the bond of 1812, but of the bond of 1816, in which Whaley was an obligor. But, where the surety, as in *Copis v. Middleton*, pays off the bond, he being himself a party to it, that payment is pleadable in bar of any action which may be brought upon it; consequently the specialty is gone.

In deciding *Copis v. Middleton*, Lord Eldon expressly admitted, that where a mortgage has been given in further security for the same debt, the surety who paid off the specialty was entitled to an assignment of the mortgage; and so if there was but one specialty, viz.: the mortgage, because there the payment did not, as in the case of a \*bond, extinguish the security without a reconveyance, and there was something to assign or transfer. It is impossible, in principle, to distinguish the case so put from the present; the ground of debt is the same

1834.—*Bulmer v. Jay.*

in the mortgage and the bond, as it is the same here in the bond of 1812, and the bond of 1816. Paying off the mortgage debt would have effectually excluded the mortgagee from any recourse against the estate in equity; and so would paying the bond of 1816 have prevented in equity, the obligee from suing on the bond of 1812, and might possibly have called from the court of common law in which any such action was brought, an order to stay proceeding on it. Yet the original security subsisted, as the mortgage subsisted, notwithstanding the discharge of the second security, and the inability of the creditor to avail himself of it in an equitable point of view, so as to have double satisfaction of his debt. It subsisted, as the mortgage did, only to the effect of clothing the surety with that creditor's rights against the principal debtor.

Upon the whole, I am clearly of opinion that this decree cannot stand, and it must, therefore, be reversed as far as regards the rights of Whaley's representatives.

[\*197]

\*BULMER v. JAY.

1834: 20th and 29th May.

Trust in a marriage settlement, to raise a sum of money charged on the settled estate, at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the executors or administrators of the wife, held, upon the whole scope and context of the instrument, a trust for the next of kin of the wife, although she died in the husband's lifetime.

THE facts of the case, together with the material provisions of the marriage settlement upon which the question arose, are stated in Mr. Simons' report upon the hearing of the cause in the court below.<sup>(a)</sup>

The Vice-Chancellor having, among other things, declared that the next of kin of Ann Carwardine were entitled to the sum of 750*l.* charged upon the messuages and premises comprised in the settlement, and directed the Master to inquire who were her next of kin living at the time of her death, the surviving executor of Richard Carwardine, the husband, presented a petition of appeal against his Honor's decree.

Mr. *Knight* and Mr. *Stinton*, for the appeal:—The Vice-Chancellor has determined that the words "executors or administrators" of Ann Carwardine, which occur in the clause disposing of the 750*l.* in the event, which has happened, of her making no appointment, are to be intended her next of kin. No case can be produced in which such a sense has been ever given to those

(a) 4 Sim. 48.



1834.—Bulmer v. Jay.

words, although it would require powerful authority to justify the court in departing so widely from their ordinary technical construction, in order to effectuate what may seem a more natural and probable intent; especially in a deed, where the strict rules of interpretation are always more rigidly observed. It may be laid down, indeed, as a proposition \*generally [\*198] true, that words of this technical description are to be understood in their ordinary sense, unless the context requires a different interpretation; *Saberton v. Skeels*, (a) *Collier v. Squire*, (b) *Anderson v. Dawson*, (c) \*Now, *prima facie*, "executors or administrators" are mere words of limitation, as "heirs and assigns" are with respect to real estate, and they indicate, therefore, no more than an intention to vest in the donee an absolute interest in the subject of the gift. The fund was not to be raised till twelve months after the death of the survivor; and, according to the language of the instrument, the trust is operative whether the husband survives or not. But what would have been the consequence had the wife been the survivor? Can it be supposed that she was to take no more than a life interest in the fund with a power of appointment, and that in default of appointment her next of kin were to take as purchasers? Such a supposition is unnatural and absurd; and yet that is the conclusion to which the Vice-Chancellor's construction inevitably leads, unless it is to be held, in opposition to the express language of the deed, that the clause was only to have effect in case Mrs. Carwardine died in her husband's lifetime. The plain object, as well as effect of the settlement, was to vest the fund in the wife to her sole and separate use, and to give her, notwithstanding coverture, the absolute control over it; and if she died first, having made no appointment, the money was directed to vest, as it would indeed have vested without any such direction, in the party who was entitled to take upon himself the character of her legal personal representative, in other words, her husband surviving her.

\*The decree, even upon its own principles, cannot be [\*199] right; for it would enable Mrs. Carwardine's next of kin to claim the whole fund unaffected by her liabilities, although, for anything that appears, she may have died insolvent, and although it is now perfectly settled that the separate property of a married woman may, by her general course of dealing, as well as by her special contracts, be made answerable for her debts; *Murray v. Barlee*, (d)

Mr. Rolfe and Mr. W. C. L. Keene, *contra*, relied upon what they submitted was the plain intent of the parties, as that was to

(a) 1 R. &amp; M. 587.

(b) 3 Russ. 467.

(c) 15 Ves. 532.

(d) 4 Sim. 82.

1834.—*Bulmer v. Jay.*

be collected from the whole scope and nature of the contract, and the language of its several provisions; for, as Lord Thurlow, in *Woodcock v. Duke of Dorset*,<sup>(a)</sup> had said, even though the words were strong and difficult to manage, the intention of the settlement was the truth and honor of the case: *Bailey v. Wright*,<sup>(b)</sup> *Watt v. Watt*.<sup>(c)</sup> The distinction between the rules of construction supposed to be applicable to deeds and wills, was exploded by Lord Kenyon in *Wright v. Kemp*.<sup>(d)</sup>

*May 29th.*—The LORD CHANCELLOR, after stating the substance of the marriage settlement, and the question raised upon it, proceeded as follows:—In this case the Vice-Chancellor was of opinion that the sum went to the next of kin of Ann Pritchard, afterwards Ann Carwardine, and his Honor made declaration to that effect, without regard to any possible [\*200] debts \*which she might owe to others. I can have no doubt that this declaration is too large. The sum must be liable to any debts of hers, or to any liability which she may have incurred affecting her property. Whether she did incur any such liability I know not. Whether she had a separate estate in the sum it is unnecessary to inquire: but if she had, and if she affected it validly with any debts of hers, to those debts the sum was certainly liable.

But in all other respects I agree with his Honor.

The words “executors or administrators” are not, by their natural import, calculated to describe next of kin. On the contrary, executors are persons selected by the testator, and administrators are those named by the Ecclesiastical Court. Generally speaking, therefore, the expression “executors or administrators” cannot be intended next of kin. But it is undeniable that an instrument, be it a deed or be it a will, may employ those words in such a manner as to leave no doubt that they do not bear their ordinary sense. Suppose the instrument were to recite, in another part, that the maker had given the personal estate so as to prevent any one whom the first taker might select, and also all whom the Ecclesiastical Court might name, from taking either as trustee or beneficially, no one can doubt that this would show the words “executors or administrators” to be used in a sense other than their ordinary acceptance. I have put a strong case; but others may easily be conceived which show, quite as plainly, that the ordinary sense is not to be attributed to the expression.

Let us look, then, at the frame of the present instrument, and see whether or not there is anything in [\*201] it which excludes the plain and ordinary meaning of the

(a) 3 Bro. C. C. 569.

(b) 18 Ves. 49.

(c) 3 Ves. 244.

(d) 3 T. R. 470.

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1834.—*Bulmer v. Jay*.

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words "executors or administrators." I agree entirely, that unless something of this kind is to be found in the instrument, that ordinary sense must prevail. The proof clearly lies on those who would set up another sense to put in its stead.

Now, if it had been intended that the husband should take, or, after him, his personal representatives, can anything be more strange and unintelligible than that this roundabout method of giving the money to him should have been adopted? Instead of saying "to the husband, his executors and administrators," it is, that he shall take through the executor of the will, or the administrator to the estate and effects.

How can one suppose the design to have been that he and his representatives should take, when, instead of giving the fund to them, the settlement gives it to the executors or administrators of his wife? No doubt he is entitled to it if those executors or administrators are to administer the estate and effects according to the law of distribution. But is not this a most extraordinary and roundabout way of giving it to him? Hence we are not only naturally led, but compelled to find some other meaning for the words.

Then it is to be considered that nothing can be more likely than that the parties to the settlement should intend to give this sum, which formed, originally, a part of the wife's estate, and was by her brought into the settlement, to the family of the wife. It is set apart, as it were, for her—she is to have, by express provision in terms, the absolute disposal of it. In whole or in part she may appoint to it, by deed in writing or will, notwithstanding her coverture; and it is only in the event of her \*having failed to dispose of it, that the clause in ques- [202] tion assumes to deal with it at all. All this clearly shows that the sum is set apart for her and hers. If "executors or administrators" are to be taken in the ordinary sense of the words, it is set apart for her, if she chooses to appoint by deed or will; but otherwise not at all—it falls at once to her husband.

The provision in the settlement, that if the real estate on which the 750*l.* were to be raised should prove insufficient, the husband's estate should bear the deficiency, makes it still more difficult to suppose that the husband is to benefit by that sum, as he must do if "executors or administrators" be taken in the ordinary sense of those words. According to the construction contended for, it would be provided, that the husband's estate should be charged with a sum to be paid to the wife's representatives, in order that they might pay it over to the husband himself or his representatives; a kind of arrangement which it may be safely asserted no persons, with their eyes open, ever made.

The cases do not throw any very material light upon this question; because it depends, by its nature, upon its own particular

1833.—*Bulmer v. Jay.*

circumstances. Nevertheless there is abundant authority for holding that words which, by their natural force and effect, are sufficient to designate the husband, may from the context be so plainly intended to exclude him, that they shall be received in the sense which leaves him out.

Thus, in *Bailey v. Wright*,<sup>(a)</sup> which was a case very ably argued and fully considered, the words, and in a settlement too, were "to the wife's next of kin or personal representatives." [\*203] \*Now no one can doubt that these words, taken alone and without more, are sufficient to designate the husband; and so it was strongly and learnedly contended in that case, nor indeed was it denied on the other side. But the court held that, in the settlement which it was called upon to construe, the husband could not be meant, or rather, that the frame of the settlement was such as to exclude him, although the words used comprehended him; for Sir William Grant said that it seemed hard to conceive how a limitation to the wife's next of kin should be introduced except for the purpose of excluding the husband, and he added that if the intention was to exclude him by the use of the words "next of kin," he could not be let in by the subsequent words "personal representatives."

The cases cited against the construction are quite inconclusive, and the best thing the appellant's counsel have to say in respect of authority is, that no case can be cited in which the expression "executors or administrators" has been construed to mean "next of kin;" a position to which I agree, but which is very far from disposing of the question. On the other hand, I lay wholly out of view *Bridge v. Abbot*,<sup>(b)</sup> *Evans v. Charles*,<sup>(c)</sup> *Holloway v. Holloway*,<sup>(d)</sup> and the late case of *Palin v. Hills*,<sup>(e)</sup> that class of cases having no bearing at all upon the present in either direction.

Something has been said as to this being a case of words employed in a settlement, and not in a will. It appears to me that the distinction sometimes taken, and almost as often lamented, between the two kinds of instruments, [\*204] \*does not find a legitimate place here. The meaning of the parties is to be gathered from the expressions they have made use of, and those are such as to leave no doubt in my mind that the wife's family were intended to take the fund here set apart, should she not appoint to it by deed or by will.

The decree must be altered by adding the words "subject to any claims which may be validly made against the said sum in respect of debts or liabilities of the wife," and in other respects affirmed; but without costs.

(a) 18 Ves. 49.

(b) 3 Bro. C. C. 224.

(c) 1 Anst. 128.

(d) 5 Ves. 399.

(e) 1 Mylne & Keen, 470.

1835.—*Mousley v. Carr.*

## \*MOUSLEY v. CARR.

[\*205]

Before the LORDS COMMISSIONERS.—1835: 27th November and 7th. December.

It is contrary to the practice of the court to permit a second rehearing before the Great Seal, unless under special circumstances.

THIS cause was set down in the paper of appeals before the Lords Commissioners. It was heard upon exceptions before the late Master of the Rolls, who made an order, by which some of the exceptions were allowed, and others overruled. Against that order, a petition of rehearing was brought before Lord Brougham, who disallowed some of the exceptions which had been allowed by the Master of the Rolls, and allowed some of the exceptions which had been overruled by his Honor.

Mr. *Wigram* now took a preliminary objection, that, as there had already been one rehearing before Lord Brougham, it was contrary to the practice of the court to permit a second rehearing before the Lord Chancellor, unless a special case were made. That rule was laid down by Lord Thurlow, in *Fox v. Mackreth*,<sup>(a)</sup> and was followed by Lord Erskine, in *The East India Company v. Boddam*.<sup>(b)</sup> The point was again raised in *Deerhurst v. The Duke of St. Albans*, which was originally heard and decided by Sir John Leach, when Vice-Chancellor.<sup>(c)</sup> That case was afterwards heard on appeal by Lord Eldon, who resigned the seals before delivering judgment; and it was again heard on appeal in December, 1829, by Lord Lyndhurst, who, on the day he quitted office, gave judgment, simply affirming his Honor's decree. Another petition of rehearing was presented; and came on to be heard before \*Lord Brougham, on the 5th of De- [\*206] cember, 1831, when the preliminary objection was taken, that the appellants had no right to a second rehearing before the Great Seal. The point was afterwards fully argued before Lord Brougham, assisted by the late Master of the Rolls and the Vice-Chancellor; and the rule laid down in *Fox v. Mackreth*, and in *The East India Company v. Boddam*, was established by the concurrent opinion of all those judges. It was admitted on that occasion, that the rule did not apply to motions, or petitions in bankruptcy.

Mr. *Jacob* for the appellants, said the present appeal was not brought by the same party, and it had never been determined, that where the judgments in the court below and upon a rehearing were conflicting, a second rehearing might not be had

(a) 2 Cox, 158; and see 1 Harg. Jurid. Arg. 451.

(b) 13 Ves. 421.

(c) 5 Mad. 232.

1835.—Mousley v. Carr.

by a different appellant. The point in question was by no means so entirely settled as was supposed, by the case of *Deerhurst v. The Duke of St. Albans*. The Master of the Rolls, in delivering his opinion in that case, said, it did not appear to him that the court should adopt any such general rule with respect to rehearings, as should exclude the exercise of a discretion as to a second rehearing under special circumstances; and that the cases of *Brown v. Higgs*,<sup>(a)</sup> and *Blackburn v. Sepson*,<sup>(b)</sup> would not fall within the principle attempted to be established, for they were both cases in which two rehearings were allowed. It was true, that the cases referred to by his Honor, only decided that there might be a rehearing before the Lord Chancellor after two rehearings at the Rolls; and that the question in *Deerhurst v. The Duke of St. Albans* was, whether there might be a second rehearing before the Great Seal, which his Honor thought in ordinary cases, could not be permitted. But that the decision in *Deerhurst v.*

[\*207] *\*The Duke of St. Albans*, was not considered as excluding the discretion of the Lord Chancellor to rehear a cause a second time, was plain from *Fournier v. Paine*,<sup>(c)</sup> the very next case in which the point was considered, and which was indeed pending at the time when an inflexible rule was

[\*208] \*supposed to be laid down in *Deerhurst v. The Duke of St. Albans*; for *Fournier v. Paine* had been heard upon appeal by Lord Lyndhurst, and was reheard by Lord Brougham. Supposing a petition for a second rehearing before the Lord Chancellor to be irregular, the proper course for the other side

(a) 8 Ves. 561.

(b) 2 V. &amp; B. 359.

(c) FOURNIER v. PAINE.

1832: 10th March.

This was a bill of foreclosure against the representatives of the mortgagor, and a party claiming under an alleged prior equitable security.

THE MASTER OF THE ROLLS made a decree in favor of the claim of the plaintiff, but that decree was reversed upon appeal by Lord Lyndhurst. A second petition of rehearing was presented to Lord Lyndhurst, who answered it in the ordinary manner, his attention not appearing to have been directed by any special application to the nature of the petition. The appeal came on to be heard before Lord Brougham, when it was contended, on the part of the appellants, that this case was distinguishable from *Deerhurst v. The Duke of St. Albans*, inasmuch as the rule laid down in that case did not apply to cases where the judgments in the court below, and upon the rehearing, were conflicting, and the second petition of rehearing was consequently not brought by the same party.

Lord Brougham said he considered the rule laid down in *Deerhurst v. The Duke of St. Albans* as declaratory of the practice of the court, but not as excluding the possibility of a deviation from it. It was laid down as the general, not as an inflexible rule on the subject. It certainly was not understood as applying to those cases only in which the consecutive judgments were concurrent, and not conflicting. His Lordship expressed an opinion unfavorable to the second petition of rehearing, unless, upon conferring with Lord Lyndhurst, he should see reason to come to a different conclusion.

1832: July 4th.—The case was afterwards reheard by Lord Brougham upon the merits.

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1836.—*Mousley v. Carr.*

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was to apply to have the cause removed from the paper of appeals; but so long as it remained undisturbed by any such application, the appellants had a right to have it reheard.

LORD COMMISSIONER SHADWELL said his impression was, that the rule had already been established; but, if that should appear doubtful, it was right that a point of so much importance to the practice of the court should be argued before all the Lords Commissioners.

*December 7th.*—On a subsequent day, LORD COMMISSIONER SHADWELL intimated that he had conferred with the Chief Commissioner; and that it was the opinion of all the Lords Commissioners, that it was contrary to the practice of the court to allow a second rehearing before the Great Seal, except under special circumstances; and that an order of court to that effect would be promulgated.





# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY.

\*MURRAY v. BARLEE.(a)

[\*209]

1834: 3d, 5th and 8th May.

Where a married woman, having separate estate, and living apart from her husband, employed a solicitor in various transactions, and promised by letters to pay him, but without referring to her separate estate, it was held, that her separate estate was liable to the payment of the solicitor's bill of costs.

*Semble*, that the separate estate of a *feme covert* is liable in equity to her general engagements, as well upon an implied undertaking as by a written obligation.

By a settlement made on the marriage of Charles William Barlee and Frances Sarah Mitchell, certain freehold estates were conveyed to three trustees and their heirs, to the intent that they should receive yearly during the joint lives of Charles Barlee, and Catharine his wife, and of Frances Sarah Mitchell, and, after the decease of Charles Barlee, or of Catharine his wife, then during the joint lives of those two persons and of Frances Sarah Mitchell, a rent charge of 100*l.*, in trust to pay and apply the same from time to time unto Frances Sarah Mitchell, or permit her to receive the same for her sole use, exclusive of her then intended or any future husband, so that the same might not be under \*his control, or subject to his disposition, [\*210] debts, or engagements; and so that the receipts of Frances Sarah Mitchell, or her appointee might, notwithstanding her coverture, be a good discharge for such part of the same as should therein be expressed to be received. Certain other freehold estates were conveyed to the same trustees and their heirs upon the like trusts, for the separate use of Frances Sarah Mitchell during her life. The settlement contained clauses restraining Frances Sarah Mitchell from anticipating, charging, or assigning the growing payments of the rent charge of 100*l.*, or the dividends of a sum of 400*l.*, which had been transferred into the names of the trustees, and declared to be for her separate use.

The marriage took place shortly after the date of the settlement.

(a) *S. C.*, before the V. C. 4 Sim. 82.

1834.—Murray v. Barlee.

In the year 1818 Mr. and Mrs. Barlee separated, and from that time continued to live apart.

In April 1819, Mrs. Barlee, by her next friend, filed a bill against her husband and the trustees of the settlement, praying for an account of the rents and dividends of the property settled to her separate use; and by a decree made at the hearing of that cause on the 11th of March, 1825, it was referred to the Master to take an account of the rents and dividends received by the trustees.

In pursuance of a decree made on further direction, on the 23d of July, 1828, two of the trustees were discharged, and a receiver of Mrs. Barlee's separate property was appointed. No new trustees were appointed in the room of the trustees discharged, and the 400*l.* stock was transferred into the name of the Accountant-General, in trust in that cause.

[\*211] \*The plaintiffs, Charles Murray and James Archibald Murray, were retained by Mrs. Barlee, and acted as her solicitors in the cause of *Barlee v. Barlee*, from June 1824 till November 1828, when she discharged them from being her solicitors; and by different orders made in that cause, they had received payment of the several sums in respect of fees, charges and disbursements, due to and incurred by them in the prosecution of that cause.

But during the above mentioned period, the plaintiffs were also employed by Mrs. Barlee in various other matters besides the suit of *Barlee v. Barlee*. In August, 1824, they were employed by her in opposing a petition presented by her husband to the Lord Chancellor, for the purpose of obtaining a commission of lunacy against her, which petition was eventually dismissed. In the same year they obtained a *habeas corpus*, by virtue of which Mrs. Barlee, who was at that time confined in Ipswich jail under the process of an ecclesiastical court, was brought up and discharged. In 1825 they were employed by her in prosecuting certain persons for a conspiracy, and they afterwards defended a suit instituted against her, for the purpose of charging her separate estate with certain debts alleged to have been incurred by her for necessities while living apart from her husband. Mr. Barlee, the husband, had several years ago become bankrupt, was insolvent, and resided out of the jurisdiction of the court. During the time the plaintiffs acted as the solicitors of Mrs. Barlee, various letters were written to them by Mrs. Barlee, in which she instructed them to act as her solicitors; and in some of such letters she adverted to her husband's bankruptcy or insolvency, and the fact of his having left England to avoid his creditors, and she promised or gave the plaintiffs to

[\*212] understand that she would pay the costs and charges to become due to them for business done by them for

1834.—*Murray v. Barlee.*

her; but she did not refer to her separate property, or expressly promise to pay such costs and charges out of it. The bill of fees, charges and disbursements, other than the costs paid to the plaintiffs in the suit of *Barlee v. Barlee*, amounted to upwards of 700*l.*, and was signed and delivered by the plaintiffs to Mrs. Barlee.

The bill filed by the plaintiffs against Charles William Barlee, and Frances Sarah his wife, and the continuing trustee of their marriage settlement, stated the above mentioned facts, and prayed a declaration that the amount due to the plaintiffs for their fees, charges and disbursements, ought to be paid to them out of the income of Mrs. Barlee's separate property; and that a sufficient part of the moneys paid into the bank by the receiver in the cause of *Barlee v. Barlee*, and of the moneys to be thereafter received on account of Mrs. Barlee's separate property, might be applied in payment of what was due to the plaintiffs, and that, in the meantime, Mrs. Barlee might be restrained from receiving any part of the proceeds of such separate property.

To that bill Mrs. Barlee put in a general demurrer, which was overruled by the Vice-Chancellor. The argument and judgment upon the demurrer are reported in the fourth volume of Mr. Simons' Reports, p. 82.

The cause was afterwards heard before the Vice-Chancellor, on the 17th of November, 1831, when his Honor decreed that the bill of costs should be taxed; that the plaintiffs should give credit for the moneys which they had received from Mrs. Barlee, and that the balance should be paid to them out of those particulars of her \*separate property as to which [\*213] she was not restrained from anticipation.

From this decision Mrs. Barlee presented a petition of appeal to the Lord Chancellor.

*The Solicitor-General* (Sir C. Pepys) and Mr. Jacobs, in support of the decree:—The liability of the separate estate of a married woman to her general personal engagements, has been distinctly recognized by Lord Thurlow in the cases of *Hulme v. Tenant*(a) and *Lillia v. Airey*.(b) In the present case there was an engagement on the part of Mrs. Barlee, equivalent to an express promise, to pay the plaintiffs out of her separate property, for she declares in one of her letters that she will hold herself responsible to the plaintiffs for the payment of their bill of costs, if they should not obtain payment from the husband. This is as much an undertaking to pay out of her separate property, as if she had expressly referred to it, for she had no other means of answering her separate obligations. That it is not necessary specifically to charge the separate estate with the payment of a debt, in order to make

(a) 1 Bro. C. C. 16.

(b) 1 Ves. jun. 277.

1834.—*Murray v. Barlee.*

it liable, is shown by the case of *Norton v. Turvill*,<sup>(a)</sup> where a *feme covert* gave a bond; and by *Bullpin v. Clarke*,<sup>(b)</sup> where a decree was made for payment of a promissory note, given by a married woman, out of her separate estate. A bond or other security given by a married woman having separate estate, has been sometimes, though not accurately, considered in the nature of an appointment of her separate estate: *Greatley v.*

[\*214] *Noble*.<sup>(c)</sup> But the form of the instrument \*is perfectly immaterial; nor is it necessary that there should be any written instrument whatever to bind the separate estate of the wife, if her intention to render it liable be otherwise sufficiently manifested. It has been held in a case before Sir William Grant,<sup>(d)</sup> where a married woman, having separate property, died indebted by bond and simple contract, that the creditor by bond had no priority, but that all the debts must be paid *pari passu*; the principle being thus distinctly recognized, that the separate estate of a married woman was liable for her general engagements. Upon the authority of that case, an implied *assumpsit* would be sufficient to entitle the plaintiffs to their bill of costs; but it is not necessary to rest their claim upon that ground, for there is an express written undertaking in the letters of Mrs. Barlee to pay the plaintiffs, and such an undertaking is as binding upon her separate property as a bond or any other instrument.

Sir Charles Wetherell and Mr. Girdlestone, Jun., for the appellant:—This is the first case in which it has been held that the implied *assumpsit* of a married woman would charge her separate estate; for though it has been assumed at the bar that there was an express undertaking on the part of Mrs. Barlee to pay out of her separate estate, the plaintiffs do not by their bill attempt to make such a case, but, on the contrary, admit that no reference was made by Mrs. Barlee to her separate estate, and that there was no express promise to pay out of it. At law a married woman can neither sue nor be sued, and she is incapable of entering into a contract, even though she be living apart [\*215] from her husband, and have a \*separate maintenance secured to her by deed: *Marshall v. Rutton*; <sup>(e)</sup> and even in equity, though her separate estate is recognized, and she may bind such estate by certain acts in the nature of an execution of a power, she is incapable of entering into a contract properly so called; and her bond, her bill of exchange, or other instrument, though operative as a *quasi* appointment, is, in reality, *qua* bond, bill of exchange, or other instrument, a mere nullity. Her person is as sacred in equity as it is at law; and, though

(a) 2 P. Wms. 144.

(b) 17 Ves. 365.

(c) 3 Mad. 79.

(d) Anon. 18 Ves. 258.

(e) 8 T. R. 545.

1834.—Murray v. Barlee.

the rule commonly laid down is, that, *quoad* her separate estate, a married woman is, to all intents and purposes, a *feme sole*, it will be found that for most practical purposes this rule is incapable of application. Thus her separate *status* cannot be so severed from her joint *status* as to enable the court, where it is of opinion that she has rendered her separate estate liable, to proceed, according to the ordinary course, *in personam*. That difficulty was felt by Lord Thurlow in *Hulme v. Tenant*,<sup>(a)</sup> where a joint bond given by a *feme covert* having separate estate, and her husband, being an instrument raising only a personal demand, was held to bind estates conveyed to trustees to the separate use of the wife. Lord Eldon never mentioned that decision without disapprobation. In *Nantes v. Corrock*<sup>(b)</sup> he called it a prodigiously strong case, and in *Jones v. Harris*<sup>(c)</sup> he intimated that whenever the point should distinctly occur, it would require full consideration. It was not without much hesitation and doubt as to the authority of *Hulme v. Tenant*, that Sir William Grant, in *Heatley v. Thomas*,<sup>(d)</sup> declared the separate estate of a *feme covert* liable to the payment of her bond. The grounds of the decision in *Bullpin v. Clarke*,<sup>(e)</sup> where a decree was made for the payment of a promissory note made by a [216] married woman out of her separate estate, do not appear, there being no judgment, and the case being otherwise imperfectly reported. The same observation applies still more strongly to the case cited on the other side,<sup>(g)</sup> in which Sir W. Grant is said to have decided that the separate property of a married woman was equitable assets for the payment of all her debts, and that simple contract creditors were consequently entitled to come in *pari passu* with a creditor by bond. That was an anonymous case, communicated to the reporter *ex relatione*, without facts, argument, or judgment; and cannot, therefore, be safely relied upon as an authority which ought to influence the court in the determination of a point so important as the present. Laying aside questions which are peculiar to this case,—such as whether a written retainer can be considered as a *quasi* appointment in execution of a power; whether a solicitor could lawfully take such a security, or any security, for future costs; and whether it is not, at any rate, against equity that, when an attempt has been made by a husband to obtain a commission of lunacy against his wife, and that attempt, if not unjustifiable and oppressive, has at least been unsuccessful, the costs of the proceeding should come out of the separate estate of the injured party,—laying aside these topics of discussion, the question whether the implied *assumpsit*

(a) 1 Bro. C. C. 16.

(b) 9 Ves. 182.

(c) 9 Ves. 497.

(d) 15 Ves. 596.

(e) 17 Ves. 365.

(g) Anon. 18 Ves. 258.

1834.—Murray v. Barlee.

of a married woman can bind her separate estate, is the substantial question before the court, and that question may, with the exception of the decree now appealed from, be considered as untouched by any direct decision. In *Greatley v. Noble*(a) this subject was much discussed, but it was not necessary to decide the point. Sir John Leach, however, said, that, "though it [\*217] was not then necessary \*to decide the point, he thought it would be difficult to find either principle or authority for reaching the separate estate of a *feme covert* as if she were a *feme sole*, without any charge on her part, either express or to be implied;" and it appears from a previous passage in the judgment, that by "a charge to be implied," he meant a charge to be implied from her joining with her husband in a security. In a subsequent case of *Stuart v. Lord Kirkwall*,(b) which was a bill filed by a milliner to obtain the benefit of a bill of exchange given by the Viscountess Kirkwall, who was living apart from her husband, out of the separate estate of the Viscountess, Sir John Leach alluded to the case of *Greatley v. Noble*, and said he continued to be of opinion that, "a *feme covert* being incapable of contract, this court could not subject her separate property to general demands; but that, as incident to the power of enjoyment of separate property, she had a power to appoint it, and that this court would consider a security executed by her as an appointment *pro tanto* of her separate estate." In *Aguilar v. Aguilar*(c) the same learned judge, repeating the doctrine which he had laid down in *Greatley v. Noble* and in *Stuart v. Lord Kirkwall*, observed that "a *feme covert* could not, by the equitable possession of separate property, acquire a power of contract; she had a power of disposition, as incident to property, and her actual disposition or appointment of the property would bind her. Being incapable of contract or general engagement, this court could not fasten upon her separate property those equities which arise out of contract and general engagement." The result of the cases is, therefore, that, although there has been no express determination of the point, whether a wife's separate estate [\*218] is liable to \*her general engagements not evidenced by any instrument in writing, yet a very strong opinion upon the point has been given by Sir John Leach, in those cases where the question was raised and deliberately considered. To that opinion there is nothing opposed, except the anonymous case before Sir W. Grant, which is too loose a note to be relied upon, and the *dicta* of Lord Thurlow in *Hulme v. Tenant*, and *Lillia v. Airey*. What Lord Thurlow says in *Hulme v. Tenant* of the wife's general personal engagements, will be found, upon

(a) 3 Mad. 79.

(b) 3 Mad. 387.

(c) 5 Mad. 414.

1834.—Murray v. Barlee.

an examination of the context, to apply not to engagements by mere parol, but to written obligations, which would raise a demand only against the person of a woman if she were *sui juris*, and as distinguished from instruments directly binding in equity the separate real estate. As to *Lillia v. Airey*, it was a case where a separate maintenance was allowed by the husband, and has no application to the present case.

The *Solicitor-General*, in reply :—The argument on the other side proceeds entirely upon the confusion of two things, between which there is in reality no analogy; namely, the contract in equity of a *feme covert* having separate estate, and an appointment in execution of a power. At law a *feme covert* has a personal incapacity to contract; but in equity she has all the rights and liabilities of a *feme sole* in respect of her separate estate. She may deal with it in whatever manner she pleases, whether by express charge or instruments in the nature of specialties, or by simple contract. Her separate estate is the creature of a court of equity; and the court, though it cannot reach her person, will follow out all the equities arising from the separate rights with which it invests her, and render her estate, whether personal or real, liable, upon \*that principle of equality [\*219] which it always observes, to the general demands of all her creditors. These principles are plainly deducible from all the authorities, and they were distinctly recognized and acted upon in the anonymous case(a) before Sir W. Grant, the authority of which there is no sufficient reason for doubting. From these principles it follows, that it is not necessary that there should be any written obligation to bind the separate estate of the wife; all that is necessary is, that there should be a sufficient obligation in conscience to raise an *assumpsit*, for, in the administration of her separate estate, all her creditors are entitled to come in *pari passu*. There is an end, therefore, to the objection, that, if the letter were a charge, the plaintiffs could not take a security against future costs; and as to the argument, that the costs of an unsuccessful attempt on the part of the husband, to obtain a commission of lunacy against his wife, ought not to come out of her separate estate, it must be observed that in no other character than that of a *feme sole*, as owner of a separate estate, could she be reasonably intended to retain solicitors to conduct proceedings against an insolvent husband. Those proceedings were brought to a successful issue; she reaped the benefit of her solicitors' exertions, and cannot now, in conscience, call upon a court of equity to declare that she is entitled to reap that benefit at the expense of her solicitors.

(a) 18 Ves. 258.

1834.—Murray v. Barlee.

*May 8th.*—The LORD CHANCELLOR, after stating the case, proceeded as follows:—It is said that this case raises, for the first time, the question whether or not a *feme covert* can bind her separate estate, and, in respect of it, be sued as a *feme* [220] *sole* \*for law expenses incurred by her, that is, for her attorney's or solicitor's bill of costs, upon her retainer and promise to pay merely, and without any more formal instrument or obligation. For I do not understand it to be denied, and, if it were, all authority would be decisive in removing even a doubt upon this, that had a bond been given to the solicitor, the separate estate would have been liable, and the wife suable upon that instrument, just as much if the consideration were a bill of costs at law or in equity, as if the instrument had had its origin in any other consideration. But it is said that here the retainer and the promise thereby implied to pay the costs incurred, or the promise proved by the correspondence, are insufficient to charge the separate estate and render the wife liable to a suit.

That at law a *feme covert* cannot in any way be sued, even for necessities, is certain. Bind herself, or her husband, by specialty she cannot; and although living with him, and not allowed necessities, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him, yet even in respect of these she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognized than is the *cestui que trust* or the mortgagor, the legal estate, which is the only interest the law recognizes, being in others. But though this is now settled law, we know that it was not always so; or at least that an exception was admitted to what all men allowed to be the general rule. When *Corbett v. Poelnitz*(a) was decided, Lord [221] \*Mansfield said, that as times alter, new customs and manners arise, and he held, with the concurrence of all his learned brothers, that where the wife has a separate maintenance, and lives apart from her husband, receiving credit upon the possession of that estate, she ought to be bound; and the action was accordingly held to lie. That this great and accomplished judge, imported his views on the subject from those courts of equity which he had once adorned as an advocate, I have no doubt; but it is certain that the decision never received the assent of Westminster Hall. That those who pronounced it very strongly adhered to it, there can be no question. Mr. Jus-

(a) 1 T. R. 5.



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tice Buller, sitting in this court a few years after, recites it among other clear points, and plainly refers to it more emphatically than to the rest, in these words: "All these things have been determined, and I know no reason why these decisions should not be as religiously and as sacredly observed as any judgment, any time, by any set of men. I believe they are founded in good sense, and are adapted to the transactions, the understanding, the welfare and interest of mankind;" *Compton v. Collinson*.<sup>(a)</sup> He adds, that the reasons on which these decisions were founded, were so satisfactory, both to the parties interested and to the profession, that no writ of error had ever been brought. It happened, however, that this was a very groundless panegyric. The profession was always much divided upon the point, and latterly the general opinion was against it. A case for the opinion of the Court of Common Pleas, was directed by Mr. J. Buller in *Compton v. Collinson*; and though the certificate of the judges, when that case came to be argued,<sup>(b)</sup> was in conformity with the law as then laid down by Lord Mansfield, yet Lord Loughborough, in delivering the judgment of the court, observed, after an elaborate review of the cases, that it could not be \*considered as a settled point, that an ac- [\*222] tion might be maintained against a married woman separated from her husband by consent, and enjoying a separate maintenance. A few years afterwards, that judgment, which had been pronounced to be as worthy of religious and sacred observance as any judgment ever delivered, was overruled, on the fullest consideration, and after two arguments, by the unanimous determination of all the judges: *Marshall v. Rutton*.<sup>(c)</sup> The doors of the courts of common law were thus shut against an admission of the equitable principle; and the law was fixed, that in those courts the wife could in no way be sued by reason of her having separate property, and living apart from her husband.

But in equity the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and her trustees. It may be added, that the current of decision has generally run in favor of such recognition. The principle has been supposed to be carried further in *Hulme v. Tenant*,<sup>(d)</sup> than it had ever been before, because there, a bond in which the husband and wife joined, and which, indeed, so far as the obligation of the wife was concerned, was absolutely void at law, was allowed to charge the wife's es-

<sup>(a)</sup> 2 Bro. C. C. 385.<sup>(b)</sup> 1 H. Blackst. 334.<sup>(c)</sup> 8 T. R. 545.<sup>(d)</sup> 1 Bro. C. C. 16.

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tate vested in trustees to her separate use, though such estate could be only reached by implication; and though till then, the better opinion seemed to be, that the wife could only bind her separate estate by a direct charge upon it. Lord Eldon repeatedly expressed his doubts as to this case; but it has been constantly acted upon by other judges, and never, in decision, departed from by \*himself. It is enough to mention *Heatley v. Thomas*,<sup>(a)</sup> and *Bullpin v. Clarke*,<sup>(b)</sup> both before Sir William Grant, who, in the latter case held the wife's separate estate to be charged by a promissory note for money lent to her, which at law never could have charged the husband in any way, directly or indirectly. The same was held as to a bill of exchange, accepted by a *feme covert* in *Stuart v. Lord Kirkwall*,<sup>(c)</sup> and an agreement by the wife as to her separate estate in *Master v. Fuller*.<sup>(d)</sup> In all these cases, I take the foundation of the doctrine to be this; the wife has a separate estate subject to her own control, and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise, is whether or not she has validly encumbered it. At first, the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it.

A good deal of the nicety that attends the doctrine of powers, thus came to be imported into this consideration of the subject. If the wife did any act directly \*charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power, was always, of course, considered as made in execution of it. But so, if by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert* without any reference to her separate estate, it was held in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instruments thus made by her, have any validity or operation; in the same man-

(a) 15 Ves. 596.

(b) 17 Ves. 365

(c) 3 Mad. 387.

(d) 1 Ves. jun. 518; and 4 Bro. C. C. 19.

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mer as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle, and it goes the full length of the present case.

But doubts have been in one or two instances expressed as to the effect of any dealing, whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all. This point was discussed in *Greatley v. Noble*,<sup>(a)</sup> and the present Master of the Rolls appears in the subsequent case of *Stuart v. Lord Kirkwall*,<sup>(b)</sup> to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatley v. Noble*, though he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point.

I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in \*equity taken as a *feme sole*, and can charge it by in- [\*225] struments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play, be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, *Kenge v. Delaval*,<sup>(c)</sup> makes no mention of such a distinction, for there being indebted generally, is all that is stated as grounding the claim; and in *Lillia v. Airey*,<sup>(d)</sup> the party who had furnished necessary supplies to the wife, was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for 60*l.*; the court, however, held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond.

But the present is by no means a case of mere general charge. If it were, I have no doubt that the claim would well lie; but there are written promises. I hold a retainer in writing to imply a promise to pay whatever shall be reasonably and lawfully demanded by the solicitor or attorney, acting under that retainer.

(a) 3 *Mad.* 79.

(b) *Ibid.* 387.

(c) 1 *Vern.* 326.

(d) 1 *Ves. jun.* 277.

1834.—*Birkett v. Hibbert.*

So, if there be no formal retainer, but only a written acknowledgment or adoption of the professional conduct, or instructions in writing to proceed further, the party \*who gives such written instructions, in effect promises to pay whatever may lawfully become due to one acting in obedience to them, that is, to pay the costs which shall be taxed. The present case is, in almost the whole, if not the whole of it, covered by such written authority, although such written authority was not necessary to bind Mrs. Barlee's separate estate. I am of opinion, therefore, that the decree of his Honor ordering the solicitor's bill to be taxed is well founded.

Nothing could more effectually defeat the very purpose of such settlements, than denying power to the wife thus to charge her estate. She is meant to be protected by the separate provisions from all oppressions and circumvention, and to be made independent of her husband as well as of all others. If she cannot obtain professional aid, and that with the facility which other parties find in obtaining it, she is not on equal terms with them. If the husband or the trustees can hold her at arm's length, and refuse her the proceeds of the fund held by them for her use, and if they can by a verbal retainer engage a solicitor, while she can only obtain such help by executing a mortgage or by granting bonds or notes, she is not on the same footing with them. I hold, therefore, that so far from a solicitor's or attorney's bill being less entitled to favor in courts of equity when sued upon, as against the separate estate of a married woman, the argument is all the other way.

I have no doubt at all on any part of this case, into which I have only gone at large from its alleged novelty, and its importance in principle; and I affirm the decree with costs.

[\*227]

\*BIRKETT v. HIBBERT.

1834: 11th and 24th February.

Where a husband has married a ward without the consent of the court, the ward's interest, and that alone, is to be consulted in framing the settlement; unless the subordinate purpose of protection against the husband can be accomplished without prejudice to the ward.

A settlement approved by the Master, where no power of appointment in default of issue was given to the wife, but the property was given over to her next of kin, was reformed by giving to the wife such a power by will only, with provisions, that the property upon failure of children, and in default of such appointment, should go to her next of kin; and in the event of her surviving her husband and having no children, that it should be at her own disposal; and in the event of her marrying a second time and having children of the first marriage, that she should have a power of appointing to each child of the second marriage a sum not exceeding that given to each child of the first.

1834.—*Birkett v. Hibbert.*

A PETITION was presented by Samuel Jackson Reid, who had been committed to the Fleet for marrying a ward of the court, praying that the Master's report, by which he had approved of a settlement to be made on the wife, might not be confirmed.

Mr. *Pepys*, for the petitioner, stated that the settlement deprived the wife of the power of appointing, by will or otherwise, in default of issue, not only during her present coverture, but during coverture with any future husband with whom she might intermarry. This was a degree of severity of which there was no instance even in the most aggravated cases, and the present was by no means a case of great aggravation, the ward having very nearly attained her majority at the time of the marriage, and the conduct of the husband, except in so far as a contempt of the court had undoubtedly been committed, not being impeached. There were three cases which showed how far this court had gone under aggravated circumstances, and in none of them had the husband been deprived of all possibility, as the petitioner Reid had been in the present case, of deriving any benefit from the property of his wife. In *Bathurst v. Murray*,<sup>(a)</sup> where the ward had been inveigled at the \*early age of [\*228] sixteen, into performing the ceremony of marriage, which was afterwards regularly solemnized by order of the court, with a person of low condition, Lord Eldon said, "there could not be much expectation of happiness where the husband had nothing, and the wife had the whole control over the property. The husband ought to have some income during the coverture; and she ought to have the power of increasing that by her will." And accordingly his Lordship directed that the husband should have 150*l.* a year during the coverture, with a power to her by her will to increase his annuity to 300*l.* In *Pearce v. Crutchfield*,<sup>(a)</sup> where the husband was prosecuted with others, and convicted for a conspiracy in procuring the marriage, he was nevertheless allowed by the settlement to compound for all his interest in his wife's fortune in consideration of the sum of 2,000*l.* In *Millet v. Rowse*,<sup>(b)</sup> a case of a most aggravated description, where the husband had obtained a license upon a false oath that the ward, who was in her fifteenth year, was of age, and was afterwards, by order of the court, indicted and convicted, and underwent the punishment of the pillory and imprisonment, the court did not, even under those flagrant circumstances, upon directing a settlement, deprive the wife of the power, in case she died without children in the lifetime of her husband, of making an appointment to him by will. As it appeared, therefore, that even

<sup>(a)</sup> 8 Ves. 74.<sup>(b)</sup> 16 Ves. 48.<sup>(c)</sup> 7 Ves. 419.

1834.—*Birkett v. Hibbert.*

in the worst cases the court had not deprived the wife of all power over her own property, and the husband of all chance of deriving any benefit from it; but, on the contrary, had acted with a view to the interest and future happiness of the wife, by leaving open to the husband an opportunity of redeeming himself by good conduct, there could be no \*doubt that, in the present case, where the circumstances were by no means of an aggravated description, the Master had mis-carried in approving a settlement of such unexampled severity, as it regarded the interests both of the husband and the wife.

Mr. *Richards*, who appeared for the father of the young lady, said the husband, at the time the marriage was concerted between him and his father, was a clerk in a solicitor's office, entirely without property or expectations; and he contended that, under all the circumstances, the conclusion to which the Master had come was right, and that there were strong reasons for approving such a settlement as excluded the husband from taking any interest in the property of his wife.

Mr. *Pepys*, in reply.

*February 24th.*—The LORD CHANCELLOR said, it had been stated on the part of the husband, that this was a case unattended by any aggravated circumstances; but to that observation he could not accede. It was a case of very considerable aggravation; and, when the conduct both of the husband and of his family was regarded, the strongest disposition naturally arose to save the property of the young lady from falling into their hands. As far, therefore, as the principle upon which alone the court could act, in cases of this description, would permit, and as far as precedents had gone, it would be proper to give such protection. But the settlement approved by the Master reduced the wife to the situation of a mere tenant for life, and deprived her of all power of appointing any part of her property to her husband or any other person. For the purpose of precluding the husband from ever benefitting by her property in any conceivable [\*230] \*event, the settlement deprived her of all power to benefit any one of her relations should her issue fail, although she had illegitimate brothers and sisters, who were excluded, while her next of kin, who, being unascertained persons, were in effect strangers to her, were made wholly independent of her bounty. None of the cases, even where the conduct of the husband had been of the worst description, furnished any precedent for such a settlement as this.

Not only was the present husband excluded by this settlement from all benefit, but any future husband; nay more, if the pres-

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ent husband died to-day, and there were no issue of the marriage, the wife had no power whatever over her property, though the reason for the restraint would then have ceased. The Master appeared to have proceeded upon an entire mistake of the province and duty of this court in dealing with the property of the ward. The ward's interest was to be consulted in the settlement, and that alone, unless the other and subordinate purpose of protection against the husband could be accomplished without any prejudice to the ward. Where her interest would suffer, the punishment of the husband, or the restraining the husband from reaping any advantage, was not to be regarded in settling the wife's estate. Whatever tended most to her advantage must be pursued, though it tended eventually to benefit the principal wrong doer.

The settlement upon the children of the marriage might stand, but with a power of appointment to her, in default of issue of this first marriage; such power to be exercised by will only, so that she might not be induced to execute any other instrument in her husband's favor. In case of her death without issue, and her not making any will, then the property should go \*to her next of kin. In case of her husband predeceas- [\*231] ing her, and there being no issue of the marriage, then she might make whatever disposition of the property she pleased. But in case of her marrying a second time, having issue of the first marriage, his Lordship thought she ought to have the power given by the settlement in *Bathurst v. Murray*,<sup>(a)</sup> which Lord Eldon very carefully considered; namely, a power to give each child of the second marriage a sum not exceeding that which each child of the first marriage had. The costs of this petition must be borne by the husband.

(a) 8 Ves. 74.

\*BUTLER v. BUSHNELL.

[\*232]

ROLLS.—1834: 20th January.

A testator bequeathed part of the residue of his property to trustees, in trust for his daughters during their lives, and after their respective deceases, for their children, and in case there should be no children of his daughters respectively, in trust for such person or persons as should happen to be his next of kin according to the Statute of Distributions: Held, that upon the death of a daughter, who survived the testator, without issue, her share went to the persons who were the testator's next of kin at her death.

JOHN BUTLER, by his will, dated the 19th of June, 1816, bequeathed his residuary personal estate to Henry Dibbin and John Bushnell, whom he appointed his executors, upon trust to invest

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the same in government or real securities, and out of the dividends and interest thereof to pay to each of his daughters, Hannah, Maria and Caroline, the yearly sum of 50*l.*, so long as they should respectively reside and live with their mother, and remain unmarried; and in case they, or either of them, should not so reside with their mother, then the yearly sum of 100*l.* each; and as to the rest and residue of such dividends and interest, in trust to pay the same to his wife, Hannah Butler, during her natural life, or during such time as she should continue a widow, to be by her applied for the maintenance of herself, and the maintenance and education of his son, John Butler, and his daughters, Hannah, Maria and Caroline; but in the event of the marriage of his wife after his decease, in trust out of the dividends and interest, to pay her an annuity of 20*l.* by half-yearly payments; and after the decease, or after such marriage, and during the remainder of the life of his wife, in trust for his son, John Butler, and his daughter Sarah, the wife of the defendant Bushnell, and his daughters, Hannah, Maria and Caroline, in equal shares and proportions, except as to the share of his daughter Sarah Bushnell, whose share he directed should be less by the sum of 3,000*l.* than the share of either of his other daughters, having given her that sum on her marriage; and as to the share of his son, John

Butler, in trust to pay the interest and dividends for his [\*233] maintenance till \*he should attain the age of twenty-one, and, on his attaining twenty-one, to transfer the same to his son to his own use; and as to the respective shares of his daughters, to pay the interest to them respectively during their or her lives or life, to their separate use, and after their respective deceases, in trust for the benefit of their children as therein mentioned; and in case there should be no child or children of his daughters respectively, or if such child or children, being a daughter or daughters, should die under the age of twenty-one without being married, or, being a son or sons, should die under the age of twenty-one years, then in trust for such person or persons who should happen to be his (the testator's) next of kin, according to the Statute of Distributions.

The testator died leaving the five children named in his will.

The bill was filed for the administration of the testator's estate by Maria Butler, and Caroline Butler, an infant, by Maria Butler, her sister and next friend, against John Bushnell, the surviving executor, the widow, and the other children of the testator, and other parties interested under the will.

The usual decree was taken at the hearing, and before the cause came on to be heard for further directions on the Master's report, Maria Butler died without having been married. The suit was revived, and, by the minutes as they were submitted to the court at the hearing on further directions in the revived suit,



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it was assumed that the next of kin at the testator's death were entitled to the share of Maria Butler; but the Master of the Rolls having expressed a doubt whether the next of kin of the testator, at the death of Maria \*Butler, might not be entitled, the cause was directed to stand over, and now came on to be argued as to that point. [\*234]

Mr. *Garratt*, for the plaintiff Caroline Butler, submitted that the probable intention of the testator was that, in case of the death of any one of his daughters without a child, her share should go to the person or persons who might, upon the happening of such contingency, be his next of kin. That construction was more obvious and natural than the construction contended for by those who were interested in including the deceased daughter in the class of next of kin entitled upon her decease; and it had been followed in the cases of *Jones v. Colbeck*(a) and *Bird v. Wood*(b) in which a similar question was raised.

Mr. *Ching* for defendants in the same interest with the plaintiff.

Mr. *Wright*, for John Butler, the son, and the administrator of Maria Butler, contended that there was nothing in this will to show that the testator intended any other persons to take under the ultimate limitation, than those persons who should be his next of kin at the time of his death; and that the deceased daughter being one of such next of kin, could not, although taking also a partial interest as tenant for life, be excluded from the interest to which she was entitled in that character. *Holloway v. Holloway*(c) *Doe dem. Garner v. Lawson*(d) *Elmsley v. Young*(e)

\*THE MASTER OF THE ROLLS:—In this case the [\*235] testator gives to his daughter Maria Butler a certain portion of his residuary property, subject to the life interest of his widow, for her life, and after her decease for her children; and he directs that, in case she should die without children, then the share of the property given to her should go to such person or persons as should happen to be his next of kin; and the question is, who are entitled to take under that gift. The parties had assumed that the next of kin here intended were necessarily the next of kin at the death of the testator, but it appeared to me very doubtful whether the construction thus assumed was the right one, and I called the attention of counsel to that point, that it might be argued before me.

(a) 8 Ves. 38.

(b) 2 Sim. &amp; Stu. 400.

(c) 5 Ves. 399.

(d) 3 East, 278.

(e) 2 Mylne &amp; Keen, 82.

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In the case of *Elmsley v. Young*, which was recently before the court, I took occasion to examine very fully all the authorities on this point, and I then referred to the case of *Briden v. Hewlett*,<sup>(a)</sup> which in the language used by the testator resembles the present case. One of the propositions then laid down by me was, that where a testator gives property over to his next of kin, after the death of a tenant for life without issue, the court must look at the whole will to ascertain who are the next of kin intended by the testator to take. In *Elmsley v. Young*, the ultimate limitation was made expressly to those persons who should be the settler's next of kin at his death, so that there could be no question that the tenant for life who answered that description was entitled. In *Briden v. Hewlett*, there was no express designation of the next of kin at the death of the testator, but, [\*236] the gift was to the testator's widow \*for her life, with remainder as she should appoint, and in default of appointment, to such person or persons as would be entitled by virtue of the Statute of Distributions; and I was of opinion, looking to the intention of the testator, to be collected from the whole will, that the testator meant his next of kin living at the death of the tenant for life.

Where a testator gives property to a person for life with remainder to his children, and if he should die without children, then over to his next of kin, it is not a probable intention that he should mean to include, as one of his next of kin, the person upon whose death without issue he has expressly directed that the property should go over. In looking to the cases, it appears to me that the court always considers whether the words of limitation are words of present intention, so that they are intended to take effect as soon as the testator's next of kin, living at his death, are ascertained; or whether they import a future period, and are referable to the event upon which the gift over is to take effect. The words "such persons as shall happen to be my next of kin," or "such persons as shall, or should be my next of kin," indicate an intention to confine the gift to such persons as shall answer the description of the testator's next of kin at the death of the tenant for life. I am of opinion, therefore, in this case, that it was the intention of the testator that the share of Maria Butler should, upon her death without issue, vest in such persons as should then be his next of kin.

(a) 2 Mylne & Keen, 90.

1834.—Ray v. Adama.

\*RAY v. ADAMS.

[\*237]

1834: 3d February.

Where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate.

THE residuary clause of the will of John Higginbotham, dated the 16th of May, 1812, was in the following words:—"As to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, I give, devise and bequeath the same, and every part thereof, unto my said dear wife, Benjamin Griffin and Robert Hawkesley, and the survivors and survivor of them, her, his and their heirs, executors and administrators, upon trust with respect to such part thereof as shall not at the time of my decease consist of moneys in the public stocks or funds standing in my name, with all convenient speed to convert and turn the same into money, and lay out the same in their names in the purchase of 3 per cent. consolidated bank annuities, for the intents and purposes following; that is to say, from the dividends and produce of such stocks and funds as shall stand in my own name, and from the dividends and produce of the 3 per cent. consolidated bank annuities so to be purchased as aforesaid, to pay unto my said wife and her assigns, an annuity or clear yearly sum of 100*l.* of lawful current money of Great Britain, for and during her natural life, by quarterly payments; also to pay unto my son, John Daniel Higginbotham, the sum of 2*l.* 2*s.* weekly, on Monday in each week for and during his life, but into his own hands only, and I hereby ratify and confirm all acts of my said trustees respecting the same; also to pay unto my brother in law, John Lowe, and his assigns, an annuity or clear yearly sum of 50*l.* of like lawful money for and during his natural life, by quarterly payments, and upon the \*decease of the said [\*238] John Lowe, I direct the stocks and funds out of which the annuity was made payable to be sold, and the produce thereof, after deducting all costs and expenses attending the same, to be paid unto my said son, John Daniel Higginbotham, in such way and manner as she, my said wife, shall think proper or direct; and upon the decease of my said wife, I direct that the stocks and funds out of which her said annuity was made payable to be sold, and the produce thereof, after deducting all costs and expenses attending the same, to be paid and equally divided amongst John Smith, Ann Wise, Sarah Smith, and Elizabeth Smith; and upon the decease of my said son, John Daniel Higginbotham, I direct the stocks and funds out of which his said

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1834.—Ray v. Adams.

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annuity of 2*l.* 2*s.* per week was made payable to be sold, and the produce thereof, after deducting all costs and expenses attending the same, to be paid unto my said wife, not doubting but she will dispose of the same for the benefit of such of my relations as may stand in need. In case the residue of my estate shall be more than sufficient to provide for payment of the said several respective annuities, then I give the surplus residue unto my said wife, for her own use absolutely, and I hereby nominate and appoint my said wife, the said Benjamin Griffin and Robert Hawkesley, joint executors of this my will."

The testator died soon after the date of his will, leaving Lydia Higginbotham, his widow, and John Daniel Higginbotham, his only son, surviving him.

The will was proved by the executors, named therein, who appropriated, out of the residue of the testator's estate, a sum of 3,640*l.* 3 per cent. consolidated bank annuities for the payment of the weekly sum of 2*l.* 2*s.* to John Daniel Higginbotham; and also set apart other \*sums of stock for the payment of the annuities to the testator's widow, and John Lowe, respectively.

Lydia Higginbotham survived her co-executors, and the sums of stock so appropriated were standing in her name at her decease. She died in the year 1823, in the lifetime of John Daniel Higginbotham, having made a will, dated the 2d of October, 1823, to the following effect: "I give, devise and bequeath to my executors hereinafter appointed, all my ready money, securities for money, debts due and owing to me, money in the public stocks or funds, and all and singular other the property, of what nature or kind soever the same may be, of which I may die possessed, not herein by me specifically bequeathed, upon trust that my executors shall and do, with all convenient speed after my decease, convert into money all such part of my estate and effects which shall not be already so converted, and invest the same in the public stocks or funds, or otherwise upon government securities, for the purpose of securing and paying the several annuities hereinafter bequeathed; and provided the moneys which may be already invested at the time of my decease should be insufficient for that purpose, upon trust, in the first place, to pay and allow to John Daniel Higginbotham, the son of my late husband, the sum of 2*l.* 2*s.* weekly and every week during his natural life, to be paid to him every Monday, in pursuance of the will of my late husband, and any other annuities that may be then payable under the said will, and upon trust to pay the several annuities following." The testatrix, after giving several annuities, proceeded as follows: "I give to Jacob Ray an annuity or clear yearly sum of 30*l.*, for and during his natural life, to commence and be paid from the time of the decease of

1834.—Ray v. Adams.

the said John \*Daniel Higginbotham, and not before; [\*240] and from and immediately after the decease of the said Jacob Ray, or of the said John Daniel Higginbotham, should he survive him, I give the principal money by which the said annuity of 30% shall or might have been produced, to all the children of the said Jacob Ray by his late wife. I give and bequeath to my nephews, Joseph Ray and John Ray, and to my nieces, Elizabeth Elliott and Martha Pugh, the sum of 100%. 3 per cent. consolidated bank annuities each, to be paid to them respectively upon the decease of the said John Daniel Higginbotham, or to such of them as shall be then living; and as to all the rest, residue and remainder of my estate and effects, of what nature or kind soever the same may be, I give, devise and bequeath the same, and every part thereof, to my sisters, Ann Adams and Sarah Adams, my nephew, the said Jacob Ray, and my friend, John Mackie the elder, to be divided between them, in equal proportions, share and share alike, for their own use and benefit absolutely." And the testatrix appointed Jacob Ray and John Mackie her executors, who proved the will.

None of the legatees named in the will of Lydia Higginbotham were relations of the testator, John Higginbotham, except John Daniel Higginbotham.

John Daniel Higginbotham died in May, 1830, leaving William Woodbridge his sole next of kin, and next of kin of the testator; and having made a will, by which he appointed John Clark and his wife Susanna Higginbotham his executors.

The original bill was filed by Jacob Ray and John Mackie, executors and residuary legatees of Lydia Higginbotham, against Ann Adams and Sarah Adams, \*the two [\*241] other residuary legatees, and William Woodbridge, for the purpose of having the rights and interests of the parties in the sum of 3,640%. 3 per cent. bank annuities, which had been appropriated for the payment of John Daniel Higginbotham's annuity, declared by the court.

William Woodbridge, the next of kin of John Daniel Higginbotham, and of the testator, John Higginbotham, died intestate, and his wife Catherine Woodbridge took out administration to his estate; and as it appeared that William Woodbridge, the party who had been made a defendant in the original bill, was only a person of the same name with the next of kin, a supplemental bill was filed, in which Catharine Woodbridge was made a party.

The above mentioned facts having been ascertained by the Master's report, the only question, when the cause came on for further directions, was to what party the sum of 3,640%. 3 per cent. consols, which had been appropriated for the payment of two guineas a week to John Daniel Higginbotham, belonged.

1834.—*Ray v. Adama*.

Mr. *Bickersteth* and Mr. *Younge*, for the personal representatives of Lydia Higginbotham, who were also two of her residuary legatees:—The testator directs the stock out of which the sum of two guineas a week was made payable, to be sold upon the decease of his son, and the produce to be paid to his wife, not doubting that she would dispose of it for the benefit of such of his relations as might stand in need. He seems not to have contemplated, and at any rate has made no provision for the contingency of the death of his widow before his son. By [\*242] that event it \*became impossible to execute the trust reposed in the discretion of the widow, and the testator has, therefore, died intestate as to the capital sum of stock out of which the annuity to the son was payable. The estate of the widow is consequently entitled to one third part of the 3,640*l.* 3 per cent. consols.

Mr. *Tinney* and Mr. *Ching*, for the executors of John Daniel Higginbotham, the son:—The testator gives to his wife the produce of the fund set apart for securing the annuity to his son, not doubting that she would dispose of the same for the benefit of such of his relations as might stand in need. This is a trust coupled with a power, to be executed at the discretion of the widow; and as the widow did not live to exercise that discretion, the execution of the trust devolves upon the court.

The only question is, who are the relations to whom the fund is to be distributed; and the court has, in similar cases, decided that the next of kin of the testator living at the death of the person failing to execute the power are entitled: *Harding v. Glyn*, (a) *D'Oyly v. Attorney-General*, (b) *Cruwys v. Colman*, (c) *Cole v. Wade*. (d) In *Cole v. Wade* the court executed the trust in favor of the next of kin at the death of the testator; a circumstance which, even if it essentially distinguished that case from the other cases cited, would not affect the title of John Daniel Higginbotham; but the difference is only apparent, and arose from the testator's executors having been the parties named to execute the trusts, and from there being no preceding life estate [\*243] \*to require a postponement of the period of distribution.

Mr. *Wakefield*, for the representative of the next of kin at the death of John Daniel Higginbotham:—It is clear that it was not the intention of the testator that the wife should exercise the discretion vested in her till the death of the son. By her death, therefore, in the lifetime of the son, the power was gone; and the next of kin, living at the death of John Daniel Higginbotham,

(a) 1 Atk. 489.

(b) 4 Vin. Ab. 485. pl. 16.

(c) 9 Ves. 319.

(d) 16 Ves. 27.

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 1834.—Grant v. Yea.
 

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were entitled; for it could never have been the intention of the testator that his only son, or his widow and son, should answer the character of "relations" among whom the gift was to be distributed by his widow on the death of his son.

Mr. *Pemberton* and Mr. *Bethell*, for Ann Adams and Sarah Adams, two of the residuary legatees of the widow:—If the widow had survived the son, it would have been difficult to say whether the testator intended that she should enjoy the fund for her life, or whether she was to make immediate distribution of it. But it is clear that she could not make any appointment in the lifetime of the son; and, therefore, as the opportunity to execute the trust never arose, it is the same thing as if the trust had never been created. The property in question is, therefore, undisposed of, and one-third of it will go to the representatives of the widow.

THE MASTER OF THE ROLLS:—Where a trustee has a power of disposition which he neglects to execute, the execution of the trust devolves on the court; but the question in this case is, whether, \*in the events which have happened, [\*244] the trust and power intended for the widow ever vested in her. The plain intention of the testator was that, after the death of his son, his widow should dispose of the property to such of his relations as then stood most in need of it; but, the widow dying in the lifetime of the son, the trust intended never vested in her, but entirely failed. The testator has in fact, therefore, made no effectual disposition of the property after the death of his son; and he is to be considered as having in that respect died intestate, and the fund must be divided according to the Statute of Distributions, namely, one-third to the representatives of the widow, and two-thirds to the representatives of the son.

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\*GRANT v. YEA.—IN THE MATTER OF YEA, AND IN [\*245]  
THE MATTER OF THE ACT FOR THE ABOLITION OF  
FINES AND RECOVERIES.

1834: 26th May.

Order made by the Lord Chancellor as protector under the 3 & 4 W. IV, c. 74, to enable a *quasi* tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund.

THE lunatic was tenant for life, and the petitioner, his eldest son, was *quasi* tenant in tail in remainder of a sum of 1,231*l.* 3 per cent. consols, being the produce of certain lands which had been sold under an order of the court in a cause, and which sum was

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1834.—In the Matter of Smythe.

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tail to dispose for an estate in fee simple or for any less estate, of the lands entailed, as against all persons having more remote interests, this tenant in tail, but for his lunacy, would be competent to grant the proposed lease so as to bind the remainderman. Under the law as it now stands, therefore, a tenant in tail in possession may grant valid leases for any term; and then, construing the twenty-fourth section of the former act prospectively and with reference to the present powers of a tenant in tail in possession, the Lord Chancellor may authorize the committee to make this lease, because such lease will now be "according to the interest" of the lunatic in his estate.

The LORD CHANCELLOR was clearly of opinion, that the act 3 & 4 W. IV, c. 74, did not empower his Lordship to permit the committee to make any lease which the Lord Chancellor, on behalf of the lunatic tenant in tail, could not have authorized prior to the passing of that act. To make such an order as was prayed, would in fact be to enable the committee to bar the estate tail *pro tanto*, which his Lordship considered not to be within the intent of the act; and his Lordship added that, in his opinion, the object could only be accomplished by means of a private act of Parliament, if the parties thought it worth while to go to that expense.

[\*249]

\*IN THE MATTER OF SMYTHE.

1834: 26th March.

Order made for payment out of court of a sum of stock, of which the petitioner was *quasi* tenant in tail in possession under a settlement, on his producing the deed enrolled, or an affidavit of the enrolment of the deed, whereby, in pursuance of the provisions of the 3 & 4 W. IV, c. 74, s. 71, he had barred the estate tail, and remainders over in the stock in question.

IN this case the petitioner had become entitled, on the death of the lunatic, his brother, to a sum of stock which was standing in the name of the Accountant-General, and subject to be invested in the purchase of land to be held upon trusts under which he would be tenant in tail in possession. The stock was the produce of a small portion of land which formed part of an estate comprised in a settlement, and which had been sold to certain road trustees, and the money paid into court under the authority of a local act of Parliament. For the purpose of barring the estate tail and the remainders over in the land to be purchased with the stock, the petitioner, in pursuance of the provisions of the Fine and Recoveries Act (3 & 4 W. IV, c. 74, s. 71), had executed the necessary deed of assignment, disposing of the stock to a trustee for himself, and the assignment had been duly



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 1834.—In the Matter of Blewitt.
 

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enrolled. The present application was, that the produce of the stock might be paid to the administrator of the deceased lunatic, towards satisfaction of a sum which was due from the petitioner to the lunatic's estate.

An order was directed to be drawn up accordingly, upon production of the deed enrolled, or an affidavit of the fact of the enrolment.

Mr. Lynch, for the petition.

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\*IN THE MATTER OF BLEWITT.

[\*250]

1834: 26th March.

The 3 & 4 W. IV, c. 74, does not authorize the Lord Chancellor, when the tenant in tail in possession is in a state of hopeless lunacy, to consent to the first tenant in tail in remainder, barring the subsequent limitations, even for the purpose of preventing the settled estate from going over to collateral relations.

THE petition stated that, under the will of the petitioner's grandfather, John Blewitt, the Llantarnam Abbey Estate was settled upon the first and other sons of the testator's son, Edward Blewitt, in tail male, with remainder to his daughters in tail general, with remainder over to collateral relations; that the eldest son of Edward Blewitt, who was now tenant in tail in possession of the settled estate, and was a bachelor of the age of thirty-six, had been for many years past in a state of hopeless lunacy; that the petitioner, who was married but had no issue, was the second son of Edward Blewitt and next tenant in tail in remainder of the settled estate; that a third son, Edmund, had died, leaving an infant daughter; and that the only daughter of the said Edward Blewitt was the petitioner's sister, Frances Mary Ann Blewitt, who was then unmarried. The petition then stated that if the petitioner and his said sister should die in the lifetime of the lunatic, without issue and without having barred the estate tail limited to them under the will of their grandfather, the Llantarnam Abbey Estate would go over to the lunatic's collateral relations, to the exclusion of the infant daughter of his deceased brother Edmund. The petition therefore prayed that the Lord Chancellor would consent to the petitioner's disposing of the settled estate, so as to enable him to acquire an estate in fee simple therein, saving only the rights of persons in respect of estates prior to the estate tail vested in the petitioner.

Mr. Whitmarsh, in support of the petition, said that if the petitioner and his sister died without issue, in the

\*lifetime of the lunatic, the estate would go over, under [\*251]

1834.—Talbot v. The Earl of Radnor.

the subsequent limitations, to very distant relations, and the daughter of the lunatic's deceased brother would be wholly excluded. The twenty-second section of the recent statute (3 & 4 W. IV, c. 74), coupled with the thirty-third and forty-eighth sections, provided only in terms for the case of a lunatic who was tenant for life of a settled estate; but the reason for calling in aid the authority of the Lord Chancellor as protector seemed equally strong, or stronger, where the lunatic had a larger interest; and perhaps, therefore, the equity of the statute might be extended to such a case, if the court saw upon the circumstances disclosed a sufficient ground for the exercise of its discretionary jurisdiction.

The LORD CHANCELLOR refused to make any order, observing that, according to the inclination of his opinion, the act of Parliament did not give him any authority to interpose in such a case; but even assuming that he possessed such authority, he did not think that any sufficient ground had been stated in the petition, to induce him to exercise a discretionary jurisdiction in the present instance.

1835: *March*.—Another petition, stating the circumstances of the case somewhat more fully, was afterwards presented by the same party, and for a similar object, to Lord Chancellor Lyndhurst. His Lordship thought that he had no jurisdiction, and declined to make any order.

The petition was thereupon withdrawn.

[\*252]

\*TALBOT v. THE EARL OF RADNOR.

ROLLS.—1834: 31st January and 4th February.

Upon a bill filed by trustees for the directions of the court in execution of the trusts of a will, if the trustees have notice of any doubt as to the title of the testator to a part of the estate devised, the person who may be benefitted by that doubt is properly made a defendant to the suit, and the court will not proceed to the execution of the trusts of the will until that doubt is removed, either by a proceeding at law, or by such other course of inquiry as the court may think proper to direct.

The legatee of a house, held by the testator on a lease at a reserved rent higher than it could be let after his death, cannot reject the gift of the lease and retain an annuity under the will, but must take the benefit *cum onere*.

THE bill was filed by the trustees under the will of Edward John Chamberlayne, for the establishment of the testator's will, and for the administration of the testator's real and personal estate under the direction of the court.

The several persons interested under the will were made parties defendants, and a person of the name of Gowland was also

added as a defendant. Amongst other estates devised by the will was a certain estate, to which the testator had been entitled as tenant in tail under the will of his grandfather, and of which he had suffered a recovery. If the recovery had not been well suffered, the particular estate would have descended to the defendant Gowland, and the bill alleged that the validity of the recovery was disputed by Gowland. The doubt entertained by the trustees as to the recovery was, whether the testator was of age at the time it was suffered; but the evidence in the cause on the part of the defendants interested under the will, clearly removed all doubt upon that point. After the bill was filed, the defendant Gowland brought an action of ejectment claiming the particular estate; and now, upon the hearing of the cause, questions were raised as to the propriety of the defendant Gowland being made a party to the suit, and as to the decree to be made in the cause. The defendant Gowland, in his answer, disputed the validity of the recovery.

\*Mr. Agar and Mr. Abbot, for the plaintiffs. [\*258]

Mr. Bickersteth, for the defendant Gowland, stated that Gowland did not dispute the validity, or resist the establishment of the will; but that he claimed by a title paramount to the will, and had, therefore, a right to proceed in his action of ejectment. Claiming, as he did, by a title paramount to the will, and not resisting the decree sought by this bill, Gowland was entitled to his costs in this suit.

Mr. Treslove, Mr. Pemberton, Mr. Temple, Mr. J. Russell, Mr. Hayter, Mr. Girdlestone, Jun., Mr. Jemmett and Mr. Benson, for other defendants.

THE MASTER OF THE ROLLS:—It appears to me that the defendant Gowland was properly made a party to the suit. The trustees, having notice of the doubt as to the validity of the recovery, could not safely proceed in the execution of the trusts of the will as to that particular estate, until that doubt was removed; and it is the duty of the court, by its decree, to adopt such course for the protection of the trustees as shall have the effect of removing the doubt, before it proceeds to deal with the estate as a part of the subject of the trust. The validity of the recovery being merely a question of law, the defendant Gowland has now a right to elect, whether he will proceed in the ejectment which he has commenced, or adopt such other course of inquiry as the court may think proper to direct, he being in no manner bound by the evidence which has been given on the part of the defendants interested under the will; and as the de-

1834.—*Lesturgeon v. Martin.*

defendant Gowland elects to proceed in the ejectment, and is willing to undertake to try that ejectment at the next [\*254] Spring Assizes, \*all that I can now usefully do is to declare the will well proved, without directing the trusts of the will to be carried into execution, inasmuch as those directions will necessarily be affected by the result of the ejectment, reserving further directions and the costs of the defendant Gowland, until that result be known. But, in the meantime, the Master may proceed with the usual account of the personal estate, debts, and legacies.

The testator bequeathed a leasehold house to his sister, Elizabeth Ackerly, and he also bequeathed to her an annuity for her life. The rent reserved by the lease was higher than the house would let for at the time of the decease of the testator; and, upon a reference to the Master to inquire whether it would be beneficial for the testator's estate to determine the lease at the end of the first seven years, the Master found that it would be beneficial, and directed the personal representatives to give notice to the lessor to that effect.

Mrs. *Ackerley*, the legatee, and her husband, disclaimed the gift of the lease; and a question was made whether, if she disclaimed the lease, she could retain the annuity, as she ought not to be allowed to reject the onerous, and retain the beneficial part of the testator's bequest.

THE MASTER OF THE ROLLS was of opinion that, as it was the plain intention of the testator that his estate should no longer be subject to the rent of the leasehold house, the legatee could not, in that respect, disappoint his intention, and retain the benefit given by his will, he must take the benefit *cum onere*.

[\*255]

\*LESTURGEON v. MARTIN.

ROLLS.—1834: 4th February.

Upon a bill filed by the vendor for the specific performance of a contract, it appeared that the defendant, in the course of correspondence between the solicitors, and upon a case stated on his part for the opinion of counsel, expressed himself willing to accept the title, if a particular objection then referred to were removed. That objection not being removed, the bill was filed, and the court ruled that the reference to the master as to the title must be in general terms, and not confined to the particular objection.

THE bill was filed for the specific performance of a contract of purchase by the defendant from the plaintiff. It appeared upon the evidence that, upon the first delivery of the abstract,

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1834.—*Lesturgeon v. Martin*.

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various objections were taken, and the abstract was returned to the plaintiff's solicitor. Observations were made thereon, on the part of the plaintiff, in answer to the several objections, and in a subsequent letter, written by the solicitor of the defendant to the solicitor of the plaintiff, it was stated that it appeared to him (the solicitor of the defendant) that all the objections were removed, except one which applied to an alleged intestacy. Several letters afterwards passed between the solicitors upon the subject of this alleged intestacy, and one of such letters from the solicitor of the defendant enclosed a copy of a case which had been submitted to counsel on the part of the defendant for his opinion as to the sufficiency of the evidence with respect to the alleged intestacy, which opinion was unfavorable to the plaintiff. It was a part of the statement in that case, that various objections which had been taken upon the abstract had been either removed or waived, and the plaintiff therefore insisted that the defendant was not entitled to a general reference to the Master to inquire into the title, but that such reference ought to be confined to the question of intestacy.

Mr. *Tinney*, for the plaintiff.

Mr. *Bickersteth*, for the defendant.

\*THE MASTER OF THE ROLLS:—The question raised [\*256] by the plaintiff as to a limited inquiry, involves a point of great general importance. The defendant, by his contract, was not bound to complete his purchase without a full and marketable title, and it is not contended that he has since done any act to the prejudice of the plaintiff, either with respect to the possession of the property or otherwise, which can affect his right to such marketable title. But it is insisted that he has waived that right, and the statement in the case laid before counsel is relied upon as binding him to such waiver. The effect of the correspondence between the solicitors, and the statement in the case for the opinion of counsel, amount to no more than this—that, according to the advice which he had received, he was then willing to complete his purchase, provided the objection as to the intestacy was removed. That objection, however, was never removed, and the voluntary assurance, given at that particular time, would not create a legal obligation upon him to relinquish in all future proceedings his original right to a marketable title. It may turn out, upon inquiry before the Master, that he had been ill advised as to the effect of some of the objections originally taken to the abstract, or it may turn out that there is matter destructive of the title of the plaintiff which did not appear upon the abstract, and the reference to the Master must therefore be general as to the title of the plaintiff.

1834.—Murkin v. Phillipson.

[\*257]

\*MURKIN v. PHILLIPSON.

ROLLS.—1834: 5th March.

A testator gave legacies of 50*l*. each to six grandchildren, when the youngest grandchild should come of age, payable from the produce of a real estate then to be sold, and if either of those children should not live to come of age, nor have an heir born in wedlock, he directed the 50*l*. to be equally divided among the surviving children. E. M., one of the six grandchildren, married during her minority, but afterwards attained twenty-one, and before the youngest grandchild attained that age, she died, leaving a child. Held, that her legacy of 50*l*. was a vested interest, and belonged to her personal representatives.

THE material part of the will of John Phillipson was in the following words:—"I also leave and bequeath to my six grandchildren, sons and daughters of Jonathan and Rebecca Hitchcock, the sum of 50*l*. each, when the youngest child shall come of age, and the said grandchildren of the said Jonathan and Rebecca to receive the interest of the said 50*l*., until the youngest child shall come of age, when an estate shall be sold, it being landed property, an estate lying in the parish of Ramsden Bell House, with house and land, twenty acres more or less, now let to John Ballard, junior, at the sum of 50*l*. per year. If either of those children should not live to come of age, nor have an heir born in wedlock, the said 50*l*. to be equally divided among the surviving children." The residue of the produce of the estate directed to be sold, after satisfying the legacies charged thereon, was given by the will to the testator's three sons, James, Robert and John Phillipson. The testator appointed Thomas Bridge and John Wells executors of his will.

The testator died, leaving James Phillipson his heir at law, Robert Phillipson and John Phillipson, the two other sons, and the six grandchildren mentioned in the will surviving him. The executors named in the will renounced probate, and letters of administration with the will annexed were granted to Robert Phillipson.

[\*258] \*Eliza Hitchcock, one of the six grandchildren, intermarried with James Norris during her minority, but afterwards attained the age of twenty-one. She survived the testator and died before the youngest grandchild attained twenty-one, leaving a child, born of her marriage with James Norris.

The bill was filed by the surviving grandchildren of the testator, and the husbands and children of such of them as were married and had issue, against the three sons of the testator, and the husband of the deceased grandchild, for the purpose of having the will established and the trusts thereof, so far as related to the legacies given to the grandchildren, carried into execution.

The question in the cause was, whether, under the circumstances above stated, Eliza Norris took a vested interest in the legacy of 50*l*. or whether, by reason that the legacy was charged

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1834.—*Murkin v. Phillipson*.

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on land directed to be sold, the 50*l.* went to the heir at law, or sunk into the residue.

Mr. *Pemberton*, for the plaintiffs.

Mr. *Garratt*, for the husband of the deceased granddaughter :— There is enough upon the face of this will to show that the testator did not intend that the legacy of 50*l.* should, in the event which has happened, go to his heir, or sink into the residue. It is no doubt perfectly true, that where a legacy is given out of real estate and made payable at a future time, and the legatee does not live till that time arrives, *prima facie* the legacy does not vest. The distinction between the time being annexed to the substance of the gift, and to the payment of it, which has been raised in favor of vesting in cases of personal estate, does not, it is admitted, apply to real estate; nor will the gift of interest avail here, as it would \*if it were a legacy [\*259] given out of personal estate. But the cases have established this exception, that where the postponing of the time of payment of a legacy charged on land is for the convenience of the testator's estate, and not owing to the circumstances of the legatee, then the inference is against the testator's intention, that the legacy should, in the event of the legatee's death before the time of payment, sink into the estate. Lord Hardwicke took that distinction in the case of *Lowther v. Condon*.<sup>(a)</sup> There the testator gave a legacy to each of his two daughters, to be raised and paid after the decease of his wife, together with the interest on the legacies after the decease of his wife, until the same should be paid to the daughters, their executors, administrators or assigns. The testator expressly provided that, if either of his daughters should die in his lifetime, her share should not lapse for the benefit of his heir, but enure to the surviving daughter. Both the daughters survived the testator, but one of them died in the lifetime of her mother; and Lord Hardwicke, as well upon the ground that the time of payment was postponed for the convenience of the testator's estate, as that the provision against lapse indicated a strong intention that the daughters should at all events be entitled to the legacies, decided that the husband of the deceased daughter was entitled to have her legacy raised out of the estate. In the present case it appears to have been rather for the convenience of the testator's estate, than with a view to the circumstances of the legatees, that the period of sale was postponed; and there is another circumstance analogous to one upon which Lord Hardwicke laid great stress in the case of *Lowther v. Condon*. Lord Hardwicke's reasoning was, that if the testator

<sup>(a)</sup> 2 Atk. 127.

1834.—*Murkin v. Phillipeon.*

provided against the event of the legacy sinking into the estate, even in case of a daughter dying in his lifetime, *a fortiori* [\*260] \*must he have intended to provide against that event, if his daughter survived him. Here there is a circumstance furnishing the same inference; for the testator has provided against the legacy sinking into the estate, in case a grandchild should die before attaining twenty-one without children; *a fortiori*, therefore, must he have intended to prevent a lapse, where a granddaughter attained twenty-one and left issue, but did not live till the period to which payment was postponed. In *Watkins v. Cheek*(a) the court recognized the principle laid down by Lord Hardwicke in *Lowther v. Condon*, and gave effect to the apparent intention of a testator, that the legacies charged by his will upon land should not fail by the death of the legatees before the time of payment.

Mr. *Piggott*, for the heir at law, who was also one of the residuary legatees:—There is no immediate gift of the estate, but a mere direction to sell it when the youngest grandchild shall attain twenty-one, interest being directed to be paid to the grandchildren in the meantime. The contingency upon which alone the legacy in question was to go to the surviving grandchildren, namely, the dying of a grandchild under twenty-one without issue, has not happened, and as the deceased granddaughter has not lived till the period of payment, the legacy has failed. This is a gift of the produce of the estates directed to be sold at a future period, and a part of that gift having failed, the heir at law is entitled to the benefit of the failure; *Cooke v. Stationer's Company*.(b)

Mr. *Bickersteth*, for the other residuary legatees:—It has been decided that a gift of a legacy charged upon real estate to be paid at a future time, with interest to be paid in the meantime, sinks into the estate, if the \*legatee die before the period of payment; *Gawler v. Standerwick*.(c) These legacies are a charge upon the estate, and there can be no doubt that it was with reference to the circumstances of the legatees, and not for the convenience of the estate, that the testator has directed the estate to be sold at a particular period after paying the charge, and the remainder of the produce of sale to be divided among his three sons. The testator, in a particular event which he has specified, namely, the death of a grandchild before attaining twenty-one without issue, has declared his intention that the legacies shall not sink into the residue. It is said that

(a) 2 Sim. &amp; Stu. 199.

(b) *Infra*, p. 262.

(c) 2 Cox, 15.



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 1831.—Cooke v. The Stationer's Company.
 

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the event which has actually happened must, by parity of reason, or for a stronger reason, fall within the same provision; but the testator has not so declared his intention, and there is no sufficient ground for inferring a larger intention than that which he has actually expressed.

Mr. *Garratt* in reply.

THE MASTER OF THE ROLLS:—In this case there is no direct gift, until the youngest grandchild attains the age of twenty-one years; but, inasmuch as interest on the legacy is given in the meantime from the death of the testator, this, if it were given out of personal estate, would be considered as an immediate vested interest, and will be so considered in the present case, if upon the whole will it should appear that the legacy does not sink into the land. The payment of these legacies might well have been postponed only for the convenience of the estate, and, if that were so, the case would not be within the principle that the legacy lapses for the benefit of the land. There is, moreover, great weight in the argument which has been urged at the bar with much ability by Mr. *Garratt*, that the legacy would \*not sink into the land, because the testator has directed [\*262] that if any of the six grandchildren should die under the age of twenty-one without leaving an heir born in wedlock, the legacy should vest in the survivors of the grandchildren. In that case the testator has declared that the legacy shall not sink into the land; and *a fortiori* it must be intended, according to the principle of Lord Hardwicke in *Louther v. Condon*, that he could not mean the legacy to sink into the land, when a grandchild attained twenty-one, and died leaving a child born in wedlock.

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#### COOKE v. THE STATIONERS' COMPANY.

ROLLS.—1831: 4th and 21st June.

Where a real estate is directed to be sold, and a part of the produce is to be applied to a purpose which fails, and the residue of the produce is given over, the heir, and not the residuary devisee, will take the sum intended for the particular purpose.

Where the real estate is not directed to be sold, and the residuary gift is not of the produce, but of the *corpus* of the estate, then if a gift, intended for a particular purpose which fails, is to be considered as an exception from the residuary gift, the heir will take; if it is to be considered as a charge upon the devised estate, the residuary devisee will be entitled to the benefit of the failure.

THE will of William Fenner, so far as it is material, was to the following effect:—"After paying all my just debts, funeral charges, and legacies for rings and mourning out of my personal

1831.—Cooke v. The Stationer's Company.

property, I give and devise to my executors hereinafter appointed all my estates, both freehold and leasehold, in trust, desiring they will sell so much of them by private contract, if they can get the several sums or more I have valued them at, on a paper enclosed within this will; when Mr. Marryat's lease expires, by public sale at auction: what is not disposed of by private contract, not before that time, when they can by sale of personal property, and such part of my estates as will purchase the sum of 10,700*l.* in the 3 per cent. consols, they need [\*263] not sell more." The \*testator then proceeded to give a number of legacies, among which was a legacy of 2,500*l.* 3 per cent. consols, to the Stationers' Company, the interest thereof to be paid to his wife during her life, and a legacy of 800*l.* 3 per cent. consols, to the parish of Beckenham for charitable purposes; and he gave and devised to his wife, Grace Fennor, the rest and residue of his estate and effects of whatsoever kind, on condition that all the legacies were paid.

The principal question in the cause was, whether so much of the produce of the real estate as was given to the Stationers' Company and the parish of Beckenham, would go to the heir at law or the residuary devisee.

Mr. *Bickersteth* and Mr. *J. Russell* for the residuary devisee.

Mr. *Tinney* and Mr. *Jacob* for the heir at law.

For the residuary devisee, *Jackson v. Hurlock*, (a) *Kenel v. Abbott*, (b) *Dawson v. Clark*, (c) and *Henchman v. Attorney-General*, (d) were cited. For the heir at law, *Arnold v. Chapman*, (e) *Gravenor v. Hallum*, (g) *Gibbs v. Rumsey*, (h) and *Jones v. Mitchell*. (i)

THE MASTER OF THE ROLLS:—This case was disposed of at the hearing on further directions, with the exception of the question, whether the heir at law or the residuary devisee, [\*264] was entitled to \*certain void legacies. By a residuary gift of personal estate, a testator gives all the personal estate which he leaves at his death not otherwise disposed of. A sum of money given by his will, which fails either as void at law or by lapse, is not otherwise disposed of, and consequently belongs to the residuary legatee. But there is a difference in respect of real estate, because the residuary devisee of a real estate, takes only that real estate to which the testator was entitled at the time of making his will, subject to the purposes of the will.

(a) Ambl. 437.

(b) 4 Ves. 802.

(c) 15 Ves. 409.

(d) 2 Sim. & Stu. 498.

(e) 1 Ves. sen. 108.

(g) Ambl. 643.

(h) 2 Ves. & B. 294.

(i) 1 Sim. & Stu. 290.

Where a real estate is directed to be sold, and the testator wills that a sum of 1,000*l.*, or any other sum of money shall be applied to a particular purpose, and the residue of the produce of sale only is given to A., and the particular purpose fails either by lapse, or because it is void at law, then the heirs and not A. will take the 1,000*l.*, or other sum of money, because the whole is real estate at the death of the testator, and A. can take no more of that estate than is expressly given to him, namely the residue of the real estate, after deducting the 1,000*l.* or other sum. The leading cases as to this point are *Cruse v. Barley*, (a) *Digby v. Legard*, (b) *Ackroyd v. Smithson*, (c) *Hutcheson v. Hammond*, (d) *Middleton v. Cater*, (e) *Arnold v. Chapman*, (g) *Gibbs v. Ramsey*, (h) *Jones v. Mitchell*, (i) *Gravenor v. Hallum*. (k)

Where real estate is not directed to be sold, and the residuary devise is not of the produce, but of the *corpus* of the real estate, there the question arises between the heir at law, and the devisee as to the intention of the testator. If the devise to a particular person, or for a \*particular purpose is to [265] be considered as intended by the testator, to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure. If it is to be considered as intended by the testator, to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure. In the case of *Wright v. Horne*, (l) the testator devised a particular estate to A. and his heirs, and all the residue of his real estate to B. and his heirs. The devise to A. having failed by his death in the testator's lifetime, the heir, and not B., was held to be entitled to the particular estate, because it was an exception out of the residuary gift. So in *Gravenor v. Hallum*, (m) the testator devised his estate, subject to certain annual payments, making together the sum of 10*l.*, upon trust to be sold, and directed the produce of the sale, to be applied to certain purposes stated in the will with a residuary gift over. These annual payments being void, the heir, and not the residuary devisee, was held entitled to the benefit of them, because they were an exception from the gift to the trustees. But in *Jackson v. Hurlock*, (n) an estate was devised subject to and charged with any sum not exceeding 10,000*l.*, as the deviser should afterwards appoint. He afterwards appointed the sum of 6,000*l.* only; and the devisee, and not the heir, had the benefit

(a) 3 P. Wms. 20.  
(b) 3 P. Wms. 22, n.  
(c) 1 Bro. C. C. 503.  
(d) 3 Bro. C. C. 128.  
(e) 4 Bro. C. C. 409.  
(g) 1 Ves. sen. 108.

(h) 2 V. & B. 294.  
(i) 1 Sim. & Stu. 290.  
(k) Ambl. 643.  
(l) 8 Mod. 222.  
(m) Ambl. 643.  
(n) Ambl. 487.

1834.—*Leighton v. Bailie*.

of the 4,000*l.* which was unappointed. So in *Wright v. Row*,<sup>(a)</sup> where there was a devise of real estate, subject to the payment of 4*l.* a year to a charity, the devisee, and not the heir, had the benefit of the void charge. In *Kennell v. Abbott*,<sup>(b)</sup> Lord Alvanley says, "It is now perfectly settled, that if an estate is [\*266] devised charged with legacies, and the \*legacies fail, no matter how, the devisee shall have the benefit of the failure. In *King v. Denison*<sup>(c)</sup> the testatrix devised her real estate, subject to and chargeable with certain annuities for life, but survived all the persons to whom the annuities were given. The heir at law claimed the whole estate on the ground that it was devised for particular trust only, which were all satisfied, and that consequently the heir was entitled by way of resulting trust. Lord Eldon held that the devisees took the estate discharged of the annuities.

In the present case, the testator gives and devises to his executors, all his freehold and leasehold estates in trust, that by sale of his personal property, and of so much of his real estates as might be necessary, they should raise a sufficient sum to purchase 10,700*l.* in the 3 per cent. consols, and he directs this sum of stock to be apportioned between certain legatees, and, among other objects of his bounty, to charities, and he then gives to his wife the rest and residue of his estate and effects, of whatsoever kind they be, on condition that all the legacies are paid.

The charitable legacies failing of course, so far as they affect his real estate, the question is, whether these legacies are to be considered as an exception from the gift to his wife, or as a charge upon that gift; and being of opinion that they are to be considered as a charge, and not as an exception from the gift, I make a declaration accordingly.

The condition to pay the legacies makes no difference, being no more than a charge of the legacies.

(a) 1 Bro. C. C. 61.  
(b) 4 Ves. 802.

(c) 1 V. & B. 260.

[\*267]

\*LEIGHTON *v.* BAILIE.

ROLLS.—1834: 28th February.

A testatrix made the following indorsement on one of her testamentary papers:—"I think there will be something left after funeral expenses, &c., paid, to give to W. B., now at school, towards equipping him to any profession." By another testamentary paper she bequeathed a sum of 500*l.* to W. B. Held, that under the first-mentioned paper W. B. was her residuary legatee.

THIS was a suit for the administration of the will of the honorable Mrs. Bailie. The will consisted of a great number of testamentary papers. In one of them, which had no date, a legacy

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of 500*l.* was given to the defendant, William A. Bailie, by the name of "Willy Bailie." Upon another, which was also without date, (being the paper marked M.,) the testatrix had made the following indorsement,—“I think there will be something left, after all funeral expenses, &c., being paid, to give to Willy Bailie, now at school, towards equipping him to any profession, he may hereafter be appointed to.” There was no express residuary gift in any of the testamentary papers.

The Master having found that by the name of "Willy Bailie," the testatrix intended to designate the defendant William A. Bailie, and that William A. Baillie was not one of her next of kin; a question now made upon further directions was, whether the indorsement on the paper marked M., was sufficient to constitute him the testatrix's residuary legatee.

*Mr. Stevens* for the plaintiff, one of the executors.

*Mr. Rolfe* for the defendant William A. Bailie.

*Mr. Turner* for the next of kin, submitted that the indorsement could not amount to a residuary bequest. No words of gift were to be found in it, nor did it contain anything showing an intention to dispose of the whole general residue of the testatrix's estate. The \*clause indeed, seemed rather to [\*268] point to some future purpose of providing for the defendant, than to constitute a present act of bounty in his favor.

The MASTER OF THE ROLLS said the paper was clearly testamentary, and that being so, it amounted to a plain expression of intention, on the part of the testatrix, that the surplus of her estate after payment of the expenses and legacies, should be taken by the person there designated as Willie Bailie. Nothing was to be found in the subsequent testamentary papers inconsistent with the intention so expressed; and the defendant W. A. Bailie must, therefore, be considered as the testatrix's residuary legatee.

\*VAN v. CORPE.

[\*269]

ROLLS—1834: 10th and 11th March.

Where, in an agreement for the lease of a house to be granted by defendants to the plaintiff, it was stipulated that the lease should contain the usual covenants between landlord and tenant, and that the house should not be converted into a school, it is immaterial whether the plaintiff had or had not notice that the defendants derived their title under a lease from another person, because the agreement amounts to a representation on the part of the defendants that they were at liberty to grant a lease conformably to the terms of the agreement.

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The usual covenants between landlord and tenant will not extend to covenants in restraint of trade; and the stipulation that the premises should not be converted into a school, does not imply and cannot be extended to a restriction against the carrying on of other trades.

Where a parol agreement, varying the terms of the written agreement, is set up by the defendants in a suit for specific performance, and supported by evidences affording a presumption or suspicion of its existence, an inquiry will be directed. A defendant may obtain an order, as of course, to examine a co-defendant after a decree, saving just exceptions.

THE bill was filed by John Van against Alfred John Corpe, Frederick Corpe and Augustus James Corpe, and it prayed that the defendants might be decreed specifically to perform an agreement, by which they had undertaken to execute a lease to the plaintiff of a certain messuage and premises; or that, in the event of their being unable specifically to fulfil such agreement, the defendants might deliver up the contract to be cancelled, and make compensation to the plaintiff for the expenses he had incurred in improving the premises during the time he had continued in possession.

The defendants carried on business as builders under the firm of Alfred Corpe & Co., and they held the house in question, together with an adjoining house, under a lease, dated the 26th of April, 1827, granted to them for the term of ninety-three years, by John Fenteman, the ground landlord. That lease contained a covenant restraining the lessees from carrying on the particular trades therein mentioned, or any other offensive trade, business or occupation whatsoever, without the license of the ground landlord.

[\*270] \*The plaintiff was in March, 1830, in occupation of the house in question, as tenant under an agreement for a term of two years, and, being desirous of taking a lease of the premises, he entered into an agreement with the defendants, the terms of which were reduced into writing by the following memorandum, dated the 16th of March, 1830, which was signed by the plaintiff and Augustus James Corpe, on behalf of himself and his co-partners:—

"Alfred Corpe & Co., agree to let, and John Van agrees to take, the house now in his occupation, being No. 8 Dorset Terrace, on lease for the term of fourteen or twenty-one years, determinable at the expiration of the first fourteen years by giving six months' notice in writing, and to pay unto Alfred Corpe & Co., a net rent of 88*l.* per annum, clear of all taxes or deductions whatsoever. The lease and rent to commence from midsummer day next, and to contain the usual covenants between landlord and tenant, and to be prepared by Messrs. Marson and Son at the expense of the said John Van; the house not to be converted into a school, nor any trees to be planted in the front court. And Alfred Corpe & Co., agree to put two closets in the bedroom, and

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also to build a two stall stable and coach-house at the bottom of the garden, at their own expense."

The plaintiff continued in possession under this agreement, and, before the building of the coach-house and stable was completed in pursuance of the agreement by the defendants, Messrs. Marson & Co., the solicitors of the defendants, prepared and sent a draft of a lease to the plaintiff, which contained a covenant restraining the lessees from carrying on any trade. That draft was, in April, 1830, returned to the defendant \*Augustus [\*271] James Corpe, and engrossed by the solicitors of the defendants.

About this time the firm of Alfred Corpe & Co., agreed to dissolve partnership, and to divide their property between them; and upon that division it was arranged between the parties that the house, mentioned in the memorandum of agreement between the firm and the plaintiff, should be taken by Frederick Corpe as part of his share of the partnership property; and, that arrangement having been communicated to the plaintiff, the plaintiff, in a letter dated the 14th of August, 1830, expressed his readiness to become the tenant of Frederick Corpe alone.

In July 1831, the defendant Frederick Corpe tendered the lease, which had been engrossed by Messrs. Marson & Co., to the plaintiff, to be executed by him. After a correspondence between the solicitor of the plaintiff and the solicitors of the defendants, which continued till December, 1832, in which it was insisted, on the part of the plaintiff, that, by the terms of the agreement, he was not bound to execute a lease containing a covenant restraining him from carrying on all trades, a lease, containing a restrictive covenant confined to the keeping of a school, was tendered by the plaintiff's solicitor for execution by the defendants, and, upon the defendants refusing to execute that lease, the present bill was filed.

There was conflicting evidence in the cause upon the facts, whether the draft of the lease prepared and afterwards engrossed by Messrs. Marson & Co., had been approved by the plaintiff, or, if that draft had not been originally approved by him, whether the plaintiff had subsequently waived his objection to it, and agreed to \*execute the deed engrossed from it, in [\*272] consideration of certain improvements made by the defendants upon the premises.

Mr. *Bickersteth* and Mr. *Ching*, for the plaintiff:—The plaintiff contracted with the defendants for a lease, which was to contain the usual covenants between landlord and tenant, subject, however, to one exception, that the house was not to be converted into a school. It was decided in *Propert v. Parker*, (a) a case re-

• (a) *Infra*, p. 280.

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cently before the court, that, if an agreement for a lease contain no stipulation as to covenants, the party agreeing to take the lease has a right to have a lease containing only usual covenants, and that a restriction against a particular trade, not being a usual covenant, cannot be introduced into such a lease. That the parties to the agreement, in the present case, knew perfectly well what usual covenants are, is manifest from the exception of the particular trade, from the carrying on of which the plaintiff is expressly restrained. The restraint with respect to the business of a schoolmaster clearly leaves the plaintiff at liberty to carry on any other business, and excludes the introduction of any other unusual covenant. The court looks upon restrictive covenants with jealousy; and, under agreements for leases, it has been held, after much consideration, that a covenant not to assign without license does not come within a contract to grant a lease with common and usual covenants; *Henderson v. Hay*,<sup>(a)</sup> *Vere v. Loveden*,<sup>(b)</sup> *Jones v. Jones*,<sup>(c)</sup> *Church v. Brown*,<sup>(d)</sup> *Browne v. Raban*.<sup>(e)</sup> But here the defendants have themselves fixed the measure of restraint to be imposed upon the plaintiff by prohibiting a particular trade; and even if the plaintiff had

[\*273] had notice, \*which he had not, that the defendants were not owners but lessees, the term of the agreement by which a particular trade is prohibited was equivalent to an undertaking that all other trades were open to the plaintiff. In *Flight v. Barton*,<sup>(g)</sup> though the defendant knew he was dealing for an under-lease, and would, therefore, under ordinary circumstances, have been bound to inquire into the covenants of the original lease, among which were covenants in restraint of particular trades, yet, as he mentioned the business he intended to follow in the house which the plaintiff agreed to underlet, the silence of the plaintiff as to the prohibiting covenants of the original lease, was held to be equivalent to a representation that there was no covenant prohibiting the particular trade of the defendant. In the present case, the defendants are not only silent as to all prohibited trades, except the single trade which they restrain the plaintiff from following, but they expressly undertake that, with that single exception, none but usual covenants shall be introduced. The defendants in their answer say, that the sense in which they understood the agreement was, that the lease, in addition to the covenants contained in the original lease, should contain a covenant that the house was not to be converted into a school; but the language of the agreement must speak for itself, and it would be too dangerous to permit a party to vary and recede from a plain written contract by importing into it a

(a) 3 Bro. C. C. 632.

(b) 12 Ves. 179.

(c) 12 Ves. 186.

(d) 15 Ves. 258.

(e) 15 Ves. 528.

(g) *Infra*, p. 282.



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construction which is at variance, not only with its legal meaning, but with the ordinary understanding of mankind.

Mr. Pemberton and Mr. Loftus Lowndes, *contra*.:—It is generally true that the intention of the parties must appear upon the language of the agreement; but \*in order to [\*274] put a just construction upon that language, the court will look to the relative situation of the parties, and the circumstances under which the contract was entered into. The plaintiff, who had held the premises for two years under a prior agreement, well knew that the defendants were lessees under the ground landlord who owned all the houses in the terrace, and that those houses were adapted only for private residences. The original lease, under which the defendants held, contained a covenant against the usual offensive trades commonly specified in leases, such as the trades of a slaughterman, butcher, tallow chandler, soapboiler, &c., and “all other offensive trades whatsoever;” and the defendants, conceiving that the business of a schoolmaster, though injurious to a class of buildings designed for private residences, might not be deemed an offensive trade, introduced a restriction against that business into the agreement, by way of addition, as they supposed, to the usual covenants between landlord and tenant. Nothing can be more natural than this explanation given by the defendants of that term of the agreement; and the defendants have positively stated in their answer that such was their intention, and such the sense in which they understood the agreement. The defendants no doubt, used the expression “usual covenants” in the popular, and not in the strictly legal sense of those words; and they inferred, reasonably enough as it should seem, that if the business of a schoolmaster were expressly prohibited, *a fortiori* all trades and occupations more offensive than the business of a schoolmaster would be prohibited, and that the agreement was substantially an agreement for a lease in which a covenant against the carrying on of any trade might be introduced. In *Doe dem. Bish v. Keeling*,<sup>(a)</sup> where the lessee \*covenanted not to carry on any trade upon [\*275] the premises, the business of a schoolmaster was held to be within the meaning of the covenant; for a reason differing materially, indeed, from that upon which the defendants in the present case proceeded, for Lord Ellenborough was of opinion that the business of a schoolmaster was likely to create as much annoyance as could be predicated of any business.

If the plaintiff understood the agreement in the same sense as the defendants, he has no equity to insist in this court upon the omission of a covenant which he knew that the defendants, by

(a) 1 M. & S. 95.

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the covenants of the original lease, were bound to insert. But even if the plaintiff did not originally understand the agreement in that sense, there is evidence to show that the plaintiff agreed to execute a lease in conformity with the draft containing the covenant against trades generally, on condition that the defendants made certain improvements on the premises, which improvements the defendants in fact executed. The evidence upon that point is admissible, according to the rule laid down by Sir William Grant in *Clarke v. Grant*,<sup>(a)</sup> that, in a suit for specific performance, though it is not open to a plaintiff to alter or correct the terms of a written agreement by parol, the defendant may resort to parol evidence against a plaintiff who seeks to have a written agreement specifically performed, independently of a collateral stipulation.

The frame of the bill is irregular; for a plaintiff cannot, except under such special circumstances as do not exist in this case, seek for specific performance, or, in the alternative, if the agreement cannot be performed, for compensation in damages. *Todd v.*

*Gee*,<sup>(b)</sup> *Niclosen v. Wordsworth*.<sup>(c)</sup> The court, however, [\*276] will not dismiss the bill, if it should be of opinion that the defendants are right in their construction of the agreement, but decree a specific performance for the defendants without a cross bill; *Fife v. Clayton*.<sup>(d)</sup>

Mr. *Bickersteth* in reply.

THE MASTER OF THE ROLLS:—In this case it is provided by the agreement entered into between the parties, that the plaintiff should accept, and the defendants should grant a lease, for a term of fourteen or twenty-one years, of the house and premises which the plaintiff then occupied; and that the intended lease should contain the usual covenants between landlord and tenant, and further, a covenant that the premises should not be converted into a school. The first question is whether, under this agreement, the defendants are or are not at liberty to insist on the insertion of a covenant restraining the carrying on of any trade upon the premises.

I consider it to be perfectly clear that the common and usual covenants between landlord and tenant will not extend to covenants in restraint of trade, and I consider that a stipulation that the premises should not be converted into a school is not to be so extended. It was argued that the stipulation ought to be construed largely, so as to apply to the carrying on of other trades, because, as was said, the business of a school, which was ex-

(a) 14 Ves. 519.

(b) 17 Ves. 273.

(c) 2 Swanst. 365.

(d) 13 Ves. 546.

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pressly prohibited, was less offensive than many other kinds of trades which were not specifically named. I am not, however, of that opinion. Parties, when they enter into agreements, must, as Lord Eldon has laid down, explain their meaning in clear and express terms, and the terms of the \*agreement [\*277] must not be left to inference or conjecture. I am further of opinion that it is quite immaterial whether the plaintiff had or had not notice that the title of the defendants themselves was derived under a lease from another person, considering that the agreement in question amounts to a representation, that, whatever was the tenure under which the defendants held the property, they were at liberty to grant a lease of it conformably to the articles of agreement, so that the question of notice or no notice of the nature of the defendant's tenure, is wholly immaterial. The only remaining consideration is, whether it be true, as set up in the defence, that certain variations in the terms of the original agreement were afterwards introduced and approved of by all parties. It is alleged by the defendants that the plaintiffs agreed to execute a lease in conformity with the draft prepared by Messrs. Marson & Co., upon the condition of the specified alterations and improvements being made in the premises. If any such agreement were proved, it would hardly be contended that the plaintiff could resist the performance of it; for it would be made upon valuable consideration, and he, as well as the defendants, would be effectually bound by it.

His Honor, after having commented upon the evidence, observed, that though there was nothing amounting to direct proof, yet there were circumstances sufficient to raise a presumption, or suspicion in the defendants' favor, and he accordingly directed a reference to the Master to inquire whether the plaintiff ever agreed to accept a lease of the premises according to the draft prepared by Messrs. Marson & Co., upon condition of certain specified improvements being executed by the defendants.

\**May 9th.*—The defendant Frederick Corpe, afterwards obtained an order as of course to examine the co-defendants, Alfred John Corpe and Augustus James Corpe, as witnesses for him on interrogatories to be settled by the Master, saving all just exceptions. A petition was now presented, on the part of the plaintiff, praying that that order might be discharged for irregularity. [\*278]

Mr. *Bickersteth* in support of the petition, cited *Franklyn v. Colquhoun*, (a) where Lord Eldon said he had always thought that a motion on the part of one defendant, to examine another,

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was not a motion of course after a decree. The order in that case, indeed, was not discharged; but the court refused to discharge it solely upon the ground that no attempt had been made to disturb it for two years. In *Purcell v. M'Namara*,<sup>(a)</sup> a motion on behalf of one defendant to examine another after decree, was held not to be a motion of course. The reason, upon which the distinction was founded, was this; that where the order, saving just exceptions, was made before the decree, the court would judge at the hearing whether there were any just exceptions; but there was no similar security after the decree. There was, moreover, no suggestion that the defendants proposed to be examined were not interested.

Mr. *Pemberton* said that, had the motion in this case been made upon notice, the defendant would have been clearly entitled to the order. The bill was filed for the specific performance of an agreement for the grant of a lease of a house in which the defendant *Frederick Corpe* alone had any interest, and the plaintiff claimed to be entitled to a lease without certain [\*279] special covenants \*introduced into the draft tendered by the defendant. The case made by the defendant was, that the plaintiff had acquiesced in the introduction of those special covenants. At the hearing it was referred to the Master to inquire whether the plaintiff had or had not so acquiesced; and the co-defendants proposed to be examined to that point, were persons who had no interest whatever in the subject matter of the suit, though they were originally parties to the agreement. As to the cases cited in support of the formal objection to the order, the supposed rule was not followed in *Franklyn v. Colquhoun*; and *Purcell v. M'Namara* had no application, because there the motion was for the re-examination of a defendant, which was necessarily the subject of a special application. Orders for the examination of one defendant by another were considered by the officers of the court to be as much of course after, as before decree.

The MASTER OF THE ROLLS, having conferred with the registrar, said it appeared to be the practice of the court, that a defendant might obtain an order as of course to examine a co-defendant after a decree, saving just exceptions. The allegation here was, that the co-defendants proposed to be examined had no interest. If it should appear that they were interested, the plaintiff might, at the proper period, object to the depositions. His Honor directed an inquiry into the practice to be made by the officers of the court.

(a) 17 Ves. 434.

1832.—*Propert v. Parker.*

On the same day, certificates were furnished by the secretaries to the Master of the Rolls, the registrars and the six clerks, confirming the opinion given by the registrar in court.

Petition dismissed with costs.

\**PROPERT v. PARKER.*

[\*280]

ROLLS.—1832: 17th March.

If an agreement for a lease contain no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants, and a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease.

THE bill was filed for the specific performance of an agreement, between the plaintiff and defendant, which had been written by the defendant, who was a barrister, and was in the following words:—"Mr. Wilmot Parker has agreed to give Mr. Propert for the house, No. 12 Duke street, Portland place, seventy guineas a year, to take a lease for fourteen or twenty-eight years, to be determinable at the option of the said Wilmot Parker at the expiration of the first fourteen years. The fixtures to be taken at a valuation. Premium, fifty guineas."

At the hearing, it was declared that the plaintiff was entitled to a specific performance of the agreement, and the usual reference was made to the Master as to the plaintiff's title, and the Master made his report in favor of the title, to which report the defendant took exceptions, which now came on to be argued. The ground on which the house was built, was originally leased by the Duke of Portland, to a person under whom the plaintiff claimed by an under-lease, of which about twenty-five years were unexpired at the date of the agreement; and the original lease, as well as the under-lease to the plaintiff, contained a covenant restraining the carrying on upon the premises of certain trades therein specified, without the special license and consent of the ground landlord. It did not appear that, at the time of the agreement, it was known to the defendant that the plaintiff had only a leasehold interest. The defendant mainly relied upon the objection taken to the title \*in respect [\*281] of the above mentioned covenant, which, with the other objections, had been overruled by the Master.

Mr. *Pemberton* in support of the exceptions.

Mr. *Bickersteth*, *contra*.

THE MASTER OF THE ROLLS:—If the defendant had been apprised at the time of the agreement, that the plaintiff had only a

1832.—*Flight v. Barton*.

leasehold interest, the question would then have arisen whether, inasmuch as the lease to be granted to the defendant, must necessarily have been subject to the covenants which bound the plaintiff, it was not, on the part of the defendant, such a want of reasonable diligence, to neglect to inform himself of the nature of those covenants, as in the consideration of a court of equity would amount to implied notice of the covenants; or whether the defendant, not inquiring into those covenants, was entitled to take it for granted that the lease to the plaintiff contained only what are termed usual covenants. That question, however, does not arise in this case, as the answer of the defendant, though relied upon for that purpose, does not amount to an admission of the defendant's knowledge that the plaintiff had only a leasehold title.

There being in the agreement no stipulation as to covenants, the defendant has a right to a lease containing only usual covenants; and, the restriction of particular trades not being a usual covenant, the exception to the Master's report must be allowed, but, under the circumstances of the case, without costs.

[\*282]

\**FLIGHT v. BARTON*.

ROLLS.—1832: 16th June.

A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease.

*Quere*, whether he has such notice of unusual covenants.

But where a party entered into an agreement with a lessee for an under-lease, and informed him of the nature of the business which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to a representation that there was no such prohibiting covenant.

THE defendant Barton entered into an agreement to take from the plaintiff an under-lease of certain premises. The original lease contained a covenant by which certain trades were prohibited. On the treaty for the lease, the defendant stated the nature of the business which he meant to carry on in the premises; and the plaintiff, not being aware that the prohibiting covenant in the original lease extended to that business, did not apprise the defendant of such covenant before he entered into the agreement. The bill was filed by the plaintiff to compel the specific performance of the defendant's agreement for the under-lease; and it appeared, upon the evidence, that the defendant's trade was within the scope of the prohibiting covenant in the original lease.

Mr. *Bickersteth* and Mr. *Kenyon Parker* for the plaintiff.

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 1832.—*Cosser v. Collinge*.
 

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*Mr. Pemberton and Mr. Barber, contra.*

THE MASTER OF THE ROLLS said, the plaintiff's silence as to the prohibiting covenant, when he was informed of the nature of the defendant's trade, had the effect of a representation that there was no such prohibiting covenant. But a defendant entering into an agreement for an under-lease, without previously inquiring into the covenants of the original lease, had constructive notice of all usual covenants. Whether he was to be considered, under such circumstances, as having constructive notice of unusual covenants, he \*believed had never [\*283] been decided, and was a very different question. But the general point did not affect the present case, which turned upon the effect of the plaintiff's silence, when he was informed of the business the defendant meant to carry on upon the premises.

By an arrangement between the parties, a decree was taken for specific performance.

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**COSSER v. COLLINGE.**

ROLLS.—1832: 15th February.

It is the duty of a person contracting for an under-lease, to inform himself of the covenants contained in the original lease; and, if he enters and takes possession of the property, he will be bound by those covenants.

Where the original lease contained unusual covenants, and the defendant entered into an agreement with the plaintiff for an under-lease, and took possession of the premises, no reference to covenants being made in the agreement, but the defendant's solicitor having had an opportunity of inspecting the original lease, it was held that the defendant was bound to accept a lease with the unusual covenants contained in the original lease.

ANDREW COSSER demised by way of mortgage, to secure the repayment of 860*l.* and interest, certain leasehold houses which he held under a lease, dated the 29th of May, 1824, for a term of sixty-two years, to Savill Godfrey; and he afterwards mortgaged the same premises, and also a piece of ground held under a lease dated the 7th of August, 1822, to his cousin Cosser, the plaintiff, to secure the repayment of the further sum of 863*l.* and interest, but subject to the mortgage of the first lease to Savill Godfrey. In the year 1829, Andrew Cosser became bankrupt, and his assignees, considering the property to be mortgaged for more than its value, declined to accept the leases, and Godfrey and the plaintiff thereupon entered into possession with the consent of the assignees; and at a meeting of the creditors of the bankrupt, convened for that purpose on the 5th of February, 1830, a resolution was passed that \*the assignees [\*284]

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1832.—*Cosser v. Collinge.*

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should assign the equity of redemption of the premises to Godfrey and the plaintiff.

The lease of May, 1824, contained a covenant to insure; a covenant to restrain the carrying on, without license of the ground landlord, of certain noisome trades therein mentioned; and a covenant to deliver up at the expiration of the term, as well all ordinary fixtures therein enumerated, as "all new erections, structures and improvements, and all other things fixed or fastened to the premises thereby demised at any time during the term." The lease of August, 1822, contained a covenant "to deliver up at the end of the term all fixtures and things which at anytime during the term should be fixed or fastened in or upon the premises, or any part thereof."

While Godfrey and the plaintiff were in possession, and before the assignment was made to them by the assignees of the bankrupt, the defendant Collinge, who was an engineer and patent axle tree manufacturer, entered into a treaty with them for an under-lease of part of the property; and being desirous of taking immediate possession, he requested Mr. Godfrey to accompany him with the leases to Mr. Watson, the defendant's solicitor, in order that the covenants in the leases might be examined, and the delay in preparing an abstract avoided. Mr. Godfrey did accordingly accompany the defendant to Mr. Watson's house, taking with him the leases; and Mr. Watson having examined the covenants, and adverted to that which prohibited particular trades, required, on the part of the defendant, a license from the ground landlord to permit the defendant to carry on his business of an engineer and patent axle tree manufacturer.

Such license was obtained from the ground landlord on [\*285] the 24th of April, 1830, and on the \*29th of the same month, the defendant took possession of the premises for which he had contracted, having previously signed an agreement, approved by Godfrey and the plaintiff, in the form of a letter as follows:—

"TO MESSRS. GODFREY & COSSER.

"*Gentlemen,*—I beg to say I am willing to take the lease of the premises in Bridge Road, Lambeth, lately occupied by Andrew Cosser, at the rent of 100*l.* per annum with 150*l.* premium, for the whole term you hold the same, short of ten days; and also to take a small portion of ground where part of the shop stands belonging to Mr. Godfrey at 7*l.* per annum rent, to commence Midsummer day next.

"CHARLES COLLINGE."

By an indenture dated the 4th of August, 1830, all the interest of Savill Godfrey in the premises, comprised in the lease of



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1832.—*Cosser v. Collinge.*

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the 29th of May, 1824, was assigned by him to the plaintiff; and afterwards by an indenture, dated the 5th of August, 1830, the equity of redemption, and all other interest of the bankrupt in the premises, were assigned by the bankrupt and his assignees to the plaintiff, in pursuance of the before mentioned resolution of the creditors.

The plaintiff informed the defendant that he was ready to grant alone a lease of the premises which the defendant had agreed to take from Godfrey and the plaintiff; and the defendant directed such lease to be proceeded with. A draft of a lease was accordingly prepared, to which the defendant objected, on the ground that it contained the before mentioned special covenants to insure, and to deliver up at the expiration of the term all new erections, structures and improvements, and all other things fixed or fastened to the premises at any time during the term.

\*The defendant's solicitors returned the draft with [\*286] the following clause of exception introduced after the last mentioned covenant:—"Except, nevertheless, and always reserved to Charles Collinge, his executors, administrators and assigns, the machinery, fixtures and implements that are now or hereafter may be set up, affixed or fastened to the said premises or any part thereof." The plaintiff insisted that he could only grant an under-lease with such covenants as were contained in the original lease, which covenants the defendant's solicitor had examined, and, with the exception of the covenant against particular trades, approved; and that as to the covenant to insure, the defendant was fully aware of it, and had actually insured the premises for 1,700*l*.

The bill was filed for the specific performance of the agreement. The defendant, by his answer, submitted that the covenants were unusual, and that he was not bound by them. He admitted that he had insured the property; but that the insurance was effected for his own security, and not by reason of his acquiescence in the special covenant to insure.

Mr. Savill Godfrey, in his evidence on the part of the plaintiff, deposed to the circumstances which took place at the house of Mr. Watson, the defendant's solicitor, when he accompanied the defendant at his earnest request to have the deeds inspected, and said, he considered that Mr. Watson, as the defendant's legal adviser, had a full opportunity of becoming acquainted with the contents of the leases.

Mr. Watson was examined on the part of the defendant, and deposed that he only cursorily examined the leases; that he advised the defendant not to take a lease, until the lessors, who were only mortgagees, had obtained the equity of redemption, and their title had been \*further investigated; that, [\*287] his attention being directed to the covenant prohibiting

1832.—*Cosser v. Collinge.*

particular trades among which was that of a smith, he apprehended that the defendant's trade would come under that prohibition, and that he thereupon stated his opinion that the landlord's consent to the carrying on of the defendant's trade upon the premises, must be obtained before the defendant could enter into any agreement for taking a lease; and that it was distinctly agreed and understood between the deponent and Savill Godfrey, that when the mortgagees' title was completed, and the landlord's license obtained, the leases should be again brought to the deponent, that he might have an opportunity of investigating the title.

*Mr. Pemberton and Mr. Stuart, for the plaintiff.*

*Mr. Bickersteth and Mr. Beales, contra.*

THE MASTER OF THE ROLLS:—The question in this case is, whether Mr. Collinge, the defendant, who agreed to take from the plaintiff an under-lease of certain premises, is to be bound by the covenants contained in the original lease. The question is first to be considered without reference to the evidence in this cause. On the 23d of April, 1830, a treaty is entered into by Collinge with Mr. Godfrey and the plaintiff; and on the 26th of April, three days afterwards, he signs an agreement which binds him to take the under-lease, and a few days afterwards he enters into possession of the premises. If there were no evidence whatever other than the facts I have now stated, *prima facie* a man who agrees to take an under-lease must know that he is to be bound by all the covenants contained in the original lease. It was the duty of Mr. Collinge to inform himself of the [\*288] covenants which were \*contained in the original lease, and if he enters and takes possession of the property, he is bound by those covenants.

So the question would have stood, if there had been no evidence. It is next to be considered upon the evidence, whether Mr. Collinge had direct or constructive notice of the nature of the covenants in the leases. Mr. Savill Godfrey says, that about the 25th of April, Collinge came to him and stated that he was desirous of entering into an agreement for an under-lease, and also to have immediate possession; and with a view to save the delay of making an abstract, he requested Mr. Godfrey, who was in possession of the leases, to accompany him to the house of Mr. Watson, the defendant's solicitor, in order that Mr. Watson might have an opportunity of examining those leases. An abstract would have contained a statement of the covenants, and it must be inferred that Mr. Watson performed his duty in examining the deeds, with a view to obviate the necessity of an abstract.

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1834.—*Breedon v. Tugman.*

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Mr. Watson's evidence is not altogether consistent with the deposition of Mr. Godfrey; but in the main points it appears to me to be so far from contradicting Mr. Godfrey's evidence, that it is to be considered, looking to the general actions and conduct of men, as substantially confirming it.

I am clearly of opinion, that Mr. Watson had either actual or constructive notice, because the deeds were brought to him for the purpose of ascertaining what, if he had used due diligence, he must have discovered. The plaintiff, therefore, is entitled to the specific performance which he asks; and as I think Mr. Watson might, with due diligence, have discovered what the covenants in the leases were, he is entitled to that specific performance with costs.

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\*BREEDON *v.* TUGMAN.

[\*289]

ROLLS—1834: 21st April.

A bequest by a testator of one-third of his personal estate to his daughter, and in case of his decease, to have the interest therein, and principal when she attained the age of twenty-five, held to give a vested interest to the daughter, though she died under that age.

THE material part of the will of Thomas Truscoat was in these words:—"I will and bequeath to Mary Truscoat, my second wife, one-third of my personal property, with the household furniture and plate, and a third of my personal property to Thomas Hodges Truscoat, my son by my first wife Sarah, to be laid out in an estate as an annuity for his natural life, and the other third to my daughter, Sarah Truscoat, by my first wife Sarah, and, in case of my decease, to have the interest therein and principal when she arrives at the age of twenty-five years."

Sarah Truscoat, the daughter, survived the testator, and in November, 1828, attained the age of twenty-one. She died in the month of February, 1832, under the age of twenty-five years, having, a short time previously, intermarried with the plaintiff Breedon.

The single question in the cause was, whether the share of the testator's property, bequeathed to his daughter Sarah, had vested in her so as to be a transmissible interest to her husband, or was to vest absolutely only in the event of her attaining the age of twenty-five.

Mr. *Pemberton*, for the plaintiff, argued that the first words of the bequest to the testator's daughter Sarah imported an absolute gift to her of a third, independent of the time of payment, and that the direction for paying her the interest of the fund, in case of his decease, and the principal at twenty-five, was and

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 1835.—*Mousley v. Carr.*


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[\*290] could only \*be intended to prevent her from wasting or misapplying the capital, but not to cut down the extent of the prior gift.

Mr. *Bickersteth* and Mr. *James Wilson* for the defendant Tugman, who had married the testator's widow and personal representative, contended that the expression "in case of my decease," must be construed as importing a contingency; and, according to that construction, the subsequent part of the bequest was merely an explanation of what the testator meant in the preceding part, namely, that the daughter should take no more than the interest till twenty-five, and that the vesting of the principal was to depend upon her living to attain that age. The last clause, indeed, was so peculiarly framed, that the contingency appeared to be applicable, as in *Knight v. Knight*,<sup>(a)</sup> as well to the interest as to the principal.

• Mr. *Girdlestone*, jun., Mr. *Randell* and Mr. *Bazalgette*, for other parties.

Mr. *Pemberton* in reply, observed, that in this case the gift of interest was immediate and vested, so that *Knight v. Knight* had no application.

The MASTER OF THE ROLLS said that this was plainly an absolute gift to the daughter, and that the payment only was postponed. The testator meant not to qualify or restrict the nature of the previous gift, but to distinguish between the time when she was to receive the interest, and the time when she was to receive the principal. Upon both grounds, therefore, the daughter must be held to have taken an immediate vested interest. [\*291] \*The case, however, was not free from doubt, and he should, therefore, make the decree in favor of the plaintiff without costs.

(a) 2 Sim. & Stu. 490.

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#### MOUSLEY v. CARR.

1835: 7th December.

THE following order was made in this cause; see p. 205, *supra*.

"Whereas William Carr, one of the defendants in this cause, did, on the 25th day of June, 1835, prefer his petition unto the Right Honorable the Lords Commissioners for the Custody of the Great Seal of Great Britain, setting forth as therein is set

1834.—Willasey v. Mashiter.

forth, and praying that the exceptions in the petition mentioned, and the matter of the plaintiff's petition of appeal, might be reheard before their Lordships accordingly, and that the order of the 20th day of November, 1834, made on the petition of the plaintiff, might be reversed or varied, and that the order of the 7th day of June, 1833, on exceptions to the Master's report in the petition of rehearing mentioned, might be affirmed; whereupon it was ordered that, upon the plaintiff or his clerk in court subscribing the said petition, thereby consenting to pay such costs, if any, as the court should think fit to award, in respect of any proceedings had since the said order, and upon his depositing 20*l.* with the registrar in a week, the said appeal should be set down to be heard before their Lordships next after the rehearings and appeals then already appointed; and the petitioner's clerk in court duly subscribed such submission, \*and such deposit was accordingly made: And this [\*292] cause coming on this present day, to be heard before their Lordships on the said petition of rehearing in the presence of counsel, upon debate of the matter and hearing the said petition of rehearing, the said order dated the 20th day of November, 1834, and the said order dated the 7th day of June, 1833, read, and what was alleged by the counsel on both sides; and it appearing that an order dated the 20th day of November, 1834, was made by the Lord Chancellor, on a petition of appeal from an order, dated the 7th day of June, 1833, made in these causes by the Right Honorable the Master of the Rolls, presented by the plaintiff, their Lordships do order that the petition of rehearing presented to their Lordships by the defendant William Carr, on the 25th day of June, 1835, be taken off the file; and it is ordered that the order made thereon, dated the 25th day of June, 1835, whereby it was ordered that upon the petitioner or his clerk in court subscribing the said petition, thereby consenting to pay such costs, if any, as this court should think fit to award in respect to any proceedings had since the said order of the twentieth day of November, 1834, be discharged, and it is ordered that the sum of 20*l.* deposited with the registrar by the said defendant William Carr on setting down his petition of rehearing be paid back to him."

\*WILLASEY v. MASHITER.

[\*293]

ROLLS.—1834: 8th, 10th and 11th March.

The assignees or executors of a bankrupt are not, under the statute, liable to pay the costs of taxation, if more than one-sixth of the bill of costs of the solicitor is deducted on taxation.

In this case, a solicitor having become bankrupt, and his bill

1834.—Willasey v. Mashiter.

of costs having been delivered by the assignees to the plaintiff, his client, the plaintiff obtained the common order for the taxation of the bill; and more than one-sixth of the amount having been deducted from the bill on taxation, the plaintiff presented a petition, praying that the costs of the taxation might be paid by the assignees; and the question was, whether the assignees were liable to pay such costs under the statute.

Mr. *Bagshawe*, for the petitioner :—There can be no doubt of the jurisdiction of the court to make the order prayed by this petitioner. The assignees stand precisely in the situation of the bankrupt solicitor, and cannot be entitled as against the client, to any exemption from those liabilities to which the solicitor would have been subjected. In the *Drapers' Company v. Davis*,<sup>(a)</sup> Lord Hardwicke referred a solicitor's bill to be taxed, on the ground of improper charges appearing on the face of it, though it had been adjusted and allowed seventeen years before. From some of the early cases it appears that the courts exercised their jurisdiction over attorneys with great severity; there is one case in *Keble*<sup>(b)</sup> where an attorney took the son of one Starkie as a clerk for five years, in consideration of the sum of 80*l.*, upon condition that he should return 40*l.* if B. died within three years, [\*294] \*but that nothing should be returned if the son died.

The son died within half a year, and, upon the application of the father to have a part of the money returned, the court held that this was most conscionable, and that the clerks of the court were to be regulated in all things by the court; and they ordered the attorney to return 40*l.* within a week, and in case of default to be imprisoned and put out of the roll. In *Parry v. Owen*,<sup>(c)</sup> a case before Lord Hardwicke after the Statute 2 G. II, c. 23, s. 23, a bill having been brought by the executrix of an attorney for money due from the defendant for business done by her husband, and the defendant having demurred partly upon the ground that the statute had pointed out a summary remedy, the demurrer was allowed. It is to be inferred, therefore, that the executor of a solicitor, or the assignee of a bankrupt solicitor—for the case of the assignee cannot stand upon higher ground than that of the executor—has the same rights, and is subject to the same liabilities under the statute, or by analogy to the statute, as the solicitor himself.

Mr. *Geldart*, *contra*.:—The assignee, no doubt, stands in the same situation as an executor, and it appears from many cases at law, that the courts had no jurisdiction to tax a bill of costs as against the executor of an attorney; *Gregg's case*,<sup>(d)</sup> *Lee v.*

<sup>(a)</sup> 2 Atk. 295.<sup>(b)</sup> Anon. 2 Keb. 318.<sup>(c)</sup> 3 Atk. 740.<sup>(d)</sup> 1 Salk. 89.

1834.—Clough v. Clough.

*Knight*, (a) *Chapple v. Chapman*, (b) *Hullock on Costa*, (c) In *Weston v. Pool* (d) an application was made after an attorney's death to tax his bill, and, more than one-sixth having been struck off, it was moved that the executrix might pay the costs; but the \*court held that the words of the act imposed the [\*295] costs upon the attorney or solicitor only, and that the executrix was not to blame if she stood upon his bill, or made out one from his books. The point is stated generally in *Tidd's Practice*, (e) that the executor or administrator of an attorney is not liable to costs of taxation, although more than one-sixth of the amount of the bill be taken off. Courts of equity, in any new or doubtful case with respect to the taxation of bills of costs, are in the habit of following the analogy of the rules established in courts of law; *Ostle v. Christian*, (g) It is unnecessary to consider what might have been the course of the court before the statute, because, as the petitioner has not paid the money into court, this is not an application to the general jurisdiction of the court, but an application under the statute. (h)

THE MASTER OF THE ROLLS:—Under the statute, assignees, like executors, are not liable to pay the costs of taxation, if more than a sixth be deducted, the excessive demand not being imputable to them, but to the solicitor. Prior to the statute, a client was not entitled to an order for taxation of a bill of costs without previously paying the money into court. In this case the petitioner obtained the common order for taxation without paying the money into court; his proceeding, therefore, was plainly under the statute, and he cannot claim the costs of taxation from the assignees.

\*CLOUGH v. CLOUGH.

[\*296]

ROLLS.—1834: 6th March.

A married woman having a power to appoint personal estate, held in trust for her, by her last will and testament, notwithstanding her coverture, made a will in exercise of her power during the life of her husband. She survived her husband, and afterwards took an assignment from her trustee of the personal estate to herself. This assignment does not operate as a revocation of the will.

BY a settlement dated the 23d of November, 1810, and made on the marriage of Sarah Gledill with Ralph Blakelock, the several sums of stock and money, securities for money, &c., therein mentioned, were assigned and transferred to John Beedam

(a) Barnes, 119.

(b) Barnes, 122.

(c) p. 499.

(d) 2 Str. 1056.

(e) Vol. I, p. 53, 8th edit.

(g) 1 Turn. &amp; Russ. 324.

(h) Anon. 2 Ves. sen. 452.

1834.—Clough v. Clough.

Charlesworth, his executors, administrators and assigns, upon trust to pay and apply the same, and the interest and dividends thereof, to such person or persons, and in such manner as Sarah Gledill should, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, direct or appoint; and in default of, and until such direction or appointment, upon trust, during the life of Sarah Gledill, to pay the dividends and interest of the said trust funds, &c., to Sarah Gledill, to her own separate use, or to such person or persons as she should appoint; and from and after the decease of Sarah Gledill, upon trust to pay and assign a part of the said trust funds, therein specified, to her intended husband, and to pay and assign the residue of such trust funds, and in case Ralph Blakelock should not survive his intended wife, the whole thereof to such person or persons, and in such manner, as Sarah Gledill, notwithstanding her coverture, and whether covert or sole, should by her last will and testament, or any writing in the nature thereof, bequeath, direct or appoint; and in default of such bequest, direction or appointment, for such person or persons of her own blood and family as would, by virtue of the Statute of Distributions, be entitled thereto. And by the same settlement all the real estate, whatsoever and wheresoever, of Sarah Gledill, was conveyed to Christopher Bolland and his heirs, to [\*297] such uses as Sarah \*Gledill, notwithstanding her coverture, and whether covert or sole, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, should direct or appoint; and in default of, and until such direction or appointment, to the use of John Beedam Charlesworth, and his heirs, during the life of Sarah Gledill, to pay the rents and profits to her for her separate use, or to such person or persons as she should appoint; and from and after the decease of Sarah Gledill, to and upon such uses as Sarah Gledill should, notwithstanding her coverture, and whether covert or sole, by her last will and testament in writing, or by any writing in the nature thereof, devise, direct or appoint; and in default of such devise, direction or appointment, to the use of the right heirs of Sarah Gledill.

The marriage took effect shortly after the date of the settlement, and on the 27th of May, 1820, Mrs. Blakelock duly executed an instrument, purporting to be her last will and testament, made in exercise of the power reserved by the settlement; and she thereby made a full disposition of her property real and personal, and among other bequests gave a legacy to her husband. And she appointed her husband and John Beedam Charlesworth executors of her will.

Ralph Blakelock died on the 28th of August, 1820, without issue, leaving his widow surviving him; and by an indenture of



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release, dated the 6th of October, 1824, and made between John Beedam Charlesworth of the one part, and Sarah Blakelock, widow, of the other part, reciting the settlement of November, 1810, and that certain after-purchased estates had been settled to the same uses; and reciting the death of Ralph Blakelock, and that Sarah Blakelock was desirous that all her real estates \*should be absolutely vested in her in fee simple, it [\*298] was witnessed that Sarah Blakelock, in exercise and execution of the power given to her by the settlement, limited and appointed all her real estates comprised in the settlement, and her other real estates, so settled to the same uses as aforesaid, to herself and her heirs; and it was witnessed that John Beedam Charlesworth conveyed the same real estates to Sarah Blakelock and her heirs. And by the same indenture, after reciting the indentures by which the mortgaged premises therein mentioned, had been conveyed to John Beedam Charlesworth, and the several mortgages, bonds and securities assigned to John Beedam Charlesworth, by the settlement of the 23d of November, 1810, upon the trusts therein mentioned, which trusts were become satisfied or void and determined by the death of Ralph Blakelock without issue, and reciting that Sarah Blakelock had become absolutely entitled to the moneys secured by the said mortgages, &c., and that she had requested John Beedam Charlesworth to reconvey to her the said mortgaged premises, and assign to her the moneys so secured as aforesaid, it was witnessed that John Beedam Charlesworth reconveyed the mortgaged premises, and assigned the moneys thereby secured, and the other property comprised in the said settlement accordingly.

In October, 1834, John Beedam Charlesworth retransferred the sum of 2,100*l.*, three per cent, consolidated bank annuities, comprised in the settlement, to Mrs. Blakelock.

Mrs. Blakelock died on the 5th of December, 1825, without having made any other disposition of any part of her property, and leaving three brothers and three sisters, and Catherine Roberts and Catherine Woods, the children of two deceased sisters, her next of kin according \*to the Statute of Dis- [\*299] tributions. A limited administration, with the testamentary paper annexed, and afterwards a general administration of Mrs. Blakelock's personal estate, were granted to the defendants, William Clough and Hannah Wilkinson, two of the next of kin.

The bill was filed by John Clough, Thomas Clough and Mary Greaves, three of the next of kin of Mrs. Blakelock, against the other next of kin, and other defendants interested under the testamentary appointment, for the purpose of having the personal estate of Mrs. Blakelock administered, and the rights of the several parties declared; and the principal question in the cause

1834.—*Clough v. Clough.*

was, whether the deed of the 6th of October, 1824, operated as a revocation of the testamentary appointment of the 27th of May, 1820, as to the personal estate of Mrs. Blakelock comprised in her marriage settlement.

Mr. *Bickersteth*, Mr. *Spence*, Mr. *Richards* and Mr. *Geldart*, for the next of kin :—There can be no question that the testamentary appointment made by Mrs. Blakelock in her husband's lifetime, was revoked by the deed of the 6th of October, 1824, as to her real estate. In *Lawrence v. Wallis*,<sup>(a)</sup> it was decided that a conveyance in fee of real estate by a trustee to a widow, who, in the lifetime of her husband, had made an appointment of it under a power by will, the conveyance reciting the power and being made conformably to it, operated as a revocation of the will; for there could be no doubt, said Lord Thurlow, which of her acts was an execution of the power. The present case is stronger; for Mrs. Blakelock not only referred to her power, but in express execution of it, appointed her real estate to [\*300] herself and her heirs, and took a \*conveyance in fee simple from her trustee. By that conveyance the testamentary appointment which she had previously executed was revoked, and the fee becoming vested in her, the power given by the settlement was extinguished. Although the real estate is not here in question, the clear intention of Mrs. Blakelock to acquire the fee simple, and alter the disposition of that part of her property by the deed of October, 1824, furnishes a strong inference as to her intention with respect to the personal estate, of which an assignment is taken from the trustee by the same instrument. She takes a conveyance and assignment to her own use of the whole of the property, real and personal, comprised in the settlement, and the uses to which she had previously appointed both descriptions of property, were, by such new appointment, equally revoked. Mrs. Blakelock, therefore, having died intestate as to her personal property, the plaintiffs, and such of the defendants as are in the same interest, are entitled to it.

Mr. *Tinney* and Mr. *Rolfe*, *contra*.:—The present case is not distinguishable from *Dingwell v. Askew*.<sup>(b)</sup> There, as here, the wife made a will during her coverture, in which she recited the power she had under her marriage settlement to dispose of her property, and in pursuance of that power appointed the stock which was the subject of the settlement. There, as here, after the death of the husband without issue, the wife took a transfer of the stock into her own name, and died without making any other disposition of her property, and Lord Kenyon decided that

<sup>(a)</sup> 2 Bro. C. C. 319.<sup>(b)</sup> 1 Cox, 427.

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no new beneficial interest was acquired by the transfer, though her property was rendered more convenient by it, and \*that her will was not thereby revoked. In the present [\*301] case, Mrs. Blakelock acquired no new beneficial interest in her property by the deed of October, 1824: she had as absolute a beneficial interest in the property before as after the execution of the deed; and the only difference made by the conveyance was that, by getting rid of the intervention of trustees, and adding the legal to the beneficial interest, she rendered her property more convenient to her. No *animus revocandi* can be inferred from the mere circumstance of a testator adding the legal to his equitable interest. Even as to real estate, it is settled that where a person having a beneficial interest in real property devises it, and afterwards acquires the legal estate, this will not operate as a revocation of the will; *Parsons v. Freeman*.(a)

THE MASTER OF THE ROLLS:—If, after a will made of real estate, the quality of that estate be changed, the will is revoked, because, by the Statute of Wills, no real estate can be devised of which the party is not seised at the time. This principle has no application to personal estate, which will pass by a will expressed in general terms, although subsequently acquired. In this case, however, there was no subsequent acquisition. Mrs. Blakelock, at the time of the will, had the whole beneficial interest in her personal estate, and the vesting of the legal interest in her by the assignment of the trustee, could in no manner affect the bequests of the will. The mere accession of the legal to the beneficial interests, is not a revocation even of real estate. The legacy given to her husband lapsed by his death, and passed by the residuary clause in the will.

(a) Ambl 116; S. C., 1 Wils. 308.

\*GAUNT v. TAYLOR.

[\*302]

ROLLS.—1834: 17th February.

Interest not allowed on a judgment debt in the Master's office, when an action at law had not been brought by the creditor on the judgment.

UPON the hearing of this suit, which was instituted by a creditor for the administration of the estate of Jonathan Taylor, deceased, the testator in the cause, the Master was directed to take an account of what was due to the creditors of the testator, and to compute interest upon such of his debts as carried interest.

Under this decree, proof was made on behalf of the estate of one Richard Stringer, in respect of a debt which had arisen un-

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der the following circumstances:—It appeared that Stringer's executors, who, under the will of their testator, were directed to place out a sum of 1,200*l.* at interest on real security, had lent that sum to the testator, Jonathan Taylor, upon a promise from him to give a mortgage for the amount. Taylor, for several years and down to the period of his death, continued to pay interest upon the sum so advanced, but never executed the promised mortgage. Upon his death, which happened in the year 1830, Stringer's executors brought an action against the personal representatives of Taylor, for the recovery of the 1,200*l.*, and on the 3d of November, in the same year, they recovered a judgment in the action for that sum. Part of the debt, amounting to 400*l.* 9*s.* 5*d.*, was, on the 9th of December following, received by Stringer's executors out of the proceeds of certain furniture belonging to the testator's estate, which furniture was on that day taken in execution and sold under a sheriff's warrant.

The Master found the before mentioned facts, and certified that he had allowed to the executors of the \*said Richard Stringer, the sum of 799*l.* 10*s.* 7*d.*, as remaining due for principal money upon the said judgment; the sum of 49*l.*, for interest on the said sum of 1,200*l.* to the 3d day of November, 1830; the sum of 31*l.* 13*s.* for the costs of the said action; the sum of 5*l.* 18*s.* 4*d.* for interest on the said sum of 1,200*l.* from the 3d day of November, 1830, to the 9th day of December, 1830, (the day when the furniture was sold;) and likewise the sum of 117*l.* 13*s.* 6*d.* for interest on the said sum of 799*l.* 10*s.* 7*d.*, from the 9th day of December, 1830, to the 21st day of November, 1833, the date of his report; which several sums amounted in the whole to 1,003*l.* 15*s.* 5*d.*

The plaintiff took exceptions to the Master's report allowing the several sums claimed for interest.

Mr. *Bickersteth* and Mr. *Ching*, in support of the exception:—The Master, computing interest at the rate of 5 per cent., has allowed a sum of 49*l.* on that account for the interval between the death of the testator and the date of the judgment recovered; another sum of 5*l.* 18*s.* 4*d.* for interest upon the amount recovered up to the time when the creditor received the proceeds of the sale; and a sum of 117*l.* 13*s.* 4*d.* for interest upon the balance up to the date of his report. The exception contends that all these sums ought to have been disallowed. The ordinary rule, both in this court and in the Exchequer, certainly is, that no interest shall be allowed on a common judgment debt; *Deschamps v. Vanneck*; (a) *Lewes v. Morgan*; (b) *Berrington v. Evans*; (c)

(a) 2 Ves. jun. 716.

(b) 3 Y. &amp; J. 394.

(c) *Youngs*, 276.

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although there may be special circumstances which would justify the \*court in departing from the ordinary [\*304] rule. No such circumstances, however, are to be found in the present case. The judgment on which the claim is founded was given after the institution of the suit, the action having been brought for the express purpose of securing to Stringer's representatives a preference over the rest of the creditors. The suit, besides, is instituted by creditors for the administration of assets, and the report shows that the court has to deal with a deficient estate, so that the question arises upon a competition as between creditors.

It will be argued, perhaps, that Stringer's representatives advanced the money to the testator under a contract for a mortgage, implying of course, an engagement for interest, and that this peculiarity makes a difference in the case; but the contract, if entered into at all, was merely verbal; it was solely through their own default that the claimants did not obtain the promised security; they were content to rely on the credit and solvency of their debtor, and they cannot now avail themselves of their own *laches* to obtain an advantage over the general body of creditors. The objection, therefore, is, that the debt was not one which originally carried interest, and that it could not be converted, after the testator's death, into a debt of that nature. The rule as to the payment of interest upon a debt is laid down by Lord Ellenborough in *De Havilland v. Bowerbank*; (a) which was afterwards confirmed by the decision of the same great judge in *De Bernales v. Fuller*, (b) and *Calton v. Bragy*, (c) where his Lordship expressly stated that "no case has occurred where upon a mere simple contract of lending \*without [\*305] an agreement for payment of the principal at a certain time, or for interest to run immediately, or, under special circumstances from whence a contract for interest was to be inferred, has interest ever been given." The same rule has been applied in equity; where it is fully established that interest can only be allowed on the ground of contract; *Lowndes v. Collens*. (d) The exception, where the money was to be paid on a certain day, and default has been made in payment, or delay occurred after judgment recovered, as in ——— v. *Edmunds*, (e) has no application to the present case.

Mr. *Treslove* and Mr. *T. Parker*, for the defendants, the executors, who were interested in protecting the fund, admitted that the judgment gave the plaintiffs at law a new right of action for

(a) 1 Camp. 50.  
 (b) 2 Camp. 428.  
 (c) 15 East, 223.

(d) 17 Ves. 27.  
 (e) 6 Taunt. 346.

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the sum for which judgment had been recovered; but, till that right was exercised, the legal debt was confined to the amount given by the finding of the jury, unless the debt appeared on the record to be one which carried interest. The delay in the proceedings necessary to make the judgment effectual, did not entitle the party to claim interest from the date of the judgment; *Gwyn v. Godby*; (a) *Doran v. O'Reilly*. (b) In *Clarke v. Seton* (c) Lord Alvanley refused to allow a creditor interest upon a judgment debt, observing that although cases had occurred, such as *Bodily v. Bellamy*, (d) in which interest had been allowed, where great delay had been occasioned by writs of error or the like, the creditor, in the case then before him, did not state any impediment in his way, or any reason to prevent him from suing upon the judgment at any time since it was entered up. And [\*306] the language of \*Lord Loughborough in addressing the counsel for the creditor, in *Creuze v. Hunter*, (e) was equally distinct. "You argue," said his Lordship, "upon the effect of a judgment at law, but would carry a Master's report further; as, upon a judgment at law, no interest subsequent to the judgment can be recovered. You may bring a fresh action upon it, as a new cause of suit; but you cannot levy for it, or charge the land under the *elegit* with the intermediate interest from the date of the judgment."

Mr. Rolfe and Mr. Koe, for the representatives of Stringer:—Without denying the general rule to be as it is stated in *Berrington v. Evans*, it is certainly laid down much too broadly in *Deschamps v. Vanneck*, a case in which the judgment in other respects is clearly erroneous. *Lewes v. Morgan* is now under appeal in the House of Lords. (g) In fact, the question, whether interest shall or shall not be allowed upon a judgment debt, is one which must always depend upon the particular circumstances of each case; and it is submitted that here the circumstances are such as fully to warrant the finding of the Master.

It is a mistake to suppose that the debt due to these creditors did not carry interest. The money was a trust fund, which they held as Stringer's executors, and they were bound to place it out at interest for the benefit of their testator's daughter, who was then an infant. The borrower, who perfectly well knew that such was the duty of the executors, induced them to [\*307] \*place the money in his hands by promising to execute to them a legal mortgage, and he showed his own sense

(a) 4 Taunt. 346.

(d) 2 Burr. 1094.

(b) 3 Price, 250.

(e) 2 Ves. jun. 162.

(c) 6 Ves. 411.

(g) The judgment in *Lucas v. Morgan*, has since been reversed by the House of Lords; 15th August, 1834.

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of the nature of the debt by regularly paying interest at 5 per cent. upon the loan as long as he lived. It was therefore a debt permanently bearing interest; and that being so, the effect of the judgment upon it at law and in equity falls next to be considered. Now it is clear that at law the only consequence of recovering a judgment for a debt carrying interest, is that the debt *transit in rem judicatam*. The security thereby acquired does not take away the right to interest upon the amount of the debt; but, if interest is sought to be recovered, an action must be brought upon the judgment, and it is then competent to the jury to award interest from the time of the judgment in the shape of damages; *McClure v. Dunkin*.(a) There are many cases in Taunton's Reports, showing that when there has been any attempt at delay on the part of the defendant, interest will be allowed on the sum for which the judgment has been recovered.(b) Lord Loughborough was in error, therefore, when he said in *Deschamps v. Vanneck* that no interest was computed upon a judgment in an action upon a judgment at law.

There are many cases in equity where interest has been allowed on a judgment, even where none could have been given at law. Such, for example, are *Stileman v. Ashdown*,(c) and *Thomas v. Edwards*,(d) where it was held, under circumstances of great delay, that the whole amount of a judgment debt should carry interest, although the objection was there urged, that a large portion of the debt consisted of costs, which of course could bear no interest. In *Dornford v. \*Dornford*(e) [\*308] the question was, whether the estate of an executor, who had neglected the duty imposed on him of accumulating rents for the benefit of an infant *cestui que trust*, should be charged with interest at 5 per cent. by reason of his neglect. Sir W. Grant in that case observed, "The question is, what is the obligation which this court attaches upon the breach of such a duty. That obligation is equivalent to the contract of the party. This court says, 'If you neglect your duty, and keep the money yourself, your obligation is to put the infant in the same situation as if you had not done so.' The court does not inquire into the particular benefit that has been made, but fastens upon the party an obligation to make good the situation of the *cestui que trust*. That is just the same thing as an engagement. If the bankrupt had entered into that engagement, could there be a doubt that the mode in which the debt would have been calculated at the date of the bankruptcy, would have been by ascertaining what would have been the amount of the debt, supposing the direction had been complied with? This is not like the case where this

(a) 1 East, 436.

(b) See Anon. 4 Taunt. 876.

(c) 2 Atk. 477.

(d) 3 Anst. 804.

(e) 12 Ves. 127.

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court imposes upon a man who has given a note not bearing interest, the obligation to pay interest."

These observations are directly applicable to the present case, in which, upon every principle of equity, interest ought to be allowed. The testator, Mr. Taylor, by borrowing the trust money with distinct notice of the obligation to which it was subject, made himself liable, as for a breach of trust, both to the executors and to the person beneficially entitled; and it never can be an answer in his mouth, or in the mouth of any party representing him, to say that, although a security carrying interest was to be given for the sum advanced, the subsequent

recovery of the judgment has relieved him or his  
[\*309] \*estate from the obligation to pay interest upon it. In

*Lowndes v. Collens*(a) there was no written undertaking to pay interest, but the agreement was, as here, to give a security which would of course carry interest, viz., promissory notes, and interest was allowed upon that ground. So in *Bushnell v. Morgan*, before the Vice-Chancellor in 1832, his Honor refused to follow the doctrine laid down in *Higgins v. Sargent*;(b) and held, that this court would, from the circumstances of the transaction, imply a contract for payment of interest, as if there had been a written contract to that effect.

Mr. *Bickersteth*, in reply.

THE MASTER OF THE ROLLS:—This case arises on an exception to the Master's report, allowing interest on a judgment debt.

At law a judgment does not carry interest, but interest may be recovered at law, in the shape of damages, by an action on the judgment. Interest will also be given at law on a judgment at law, where the effect of the judgment has been impeded by a course of dilatory and vexatious proceedings on the part of the debtor. In like manner, and upon the same principle, the Court of Exchequer Chamber, affirming the judgment upon a writ of error, will give interest upon a judgment, if the original debt carried interest, but not otherwise. So if an application be made on the part of the debtor, to a court of law for its assistance or indulgence in matters regarding the judgment, it will  
[\*310] be granted \*only on the condition of the debtor paying interest on the judgment.

It appears by the authorities which have been cited, that equity in this respect follows the law; and, as a general rule, a judgment creditor is not allowed interest on his judgment in the Master's office. The same vexatious course of proceeding,

(a) 17 Ves. 237.

(b) 2 B. & Cress. 348; and see *Page v. Newman*, 9 B. & Cress. 378.



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which would entitle the creditor to interest at law, will certainly entitle him to interest on his judgment in equity. So if the debtor apply in equity for the assistance or indulgence of the court, it will be granted only upon the terms of paying interest on the judgment.

It is argued that, as interest on a promissory note is at law recoverable only in the shape of damages, and yet such interest is allowed in the Master's office, so interest on a judgment, being recoverable at law in the shape of damages, ought in like manner to be allowed in the Master's office. A promissory note is not satisfied in law or equity without the payment of interest. A judgment debt is satisfied both at law and in equity without the payment of interest, unless an action be brought on the judgment to recover damages. If an action at law were brought on a judgment, and it was afterwards sought to restrain the action by injunction in equity, I am of opinion that such injunction should not be granted without imposing upon the debtor, the condition of paying that interest which, without the interference of the Court of Equity, the creditor would in such case recover at law in the shape of damages; and this appears to have been the reason why interest on the judgment was given by the Court of Exchequer in the case of *Thomas v. Edwards*.(a)

\*In this case, however, no action at law has been brought [\*311] on the judgment so as to found the claim for interest, and the exceptions to the Master's report must therefore be allowed.

(a) 3 Anst. 804.

## MILWARD v. MILWARD.

ROLLS.—1834: 6th March.

By a marriage settlement, the husband covenanted to secure to the wife for her life, if she survived him, the dividends of a sum of 4,000*l.* navy 5 per cent. annuities. The husband had no stock in the navy 5 per cents. at the date of the settlement, or at any subsequent period. By an act of Parliament, the navy 5 per cents. were converted into new 4 per cents., and by another act it was provided, that all obligations for the transfer of navy 5 per cents. should be satisfied by a transfer of 105*l.* in the new 4 per cents. for every 100*l.* in the navy 5 per cents. By a subsequent act the new 4 per cent. annuities were converted into new 3 1-2 per cent. annuities, and it was provided, that all obligations to transfer the new 4 per cents., should be satisfied by transferring an equal sum of new 3 1-2 per cents. The widow, under her settlement, is entitled only to a transfer of 105*l.* in the new 3 1-2 per cents. for every 100*l.* of the navy 5 per cents. under her husband's covenant.

By a settlement dated the 1st of September, 1820, and made previously to the marriage of Benjamin Milward and the defendant Priscilla Milward, then Priscilla Rogers, Benjamin Milward covenanted for himself, his heirs, executors and administrators, that, in case he should die in the lifetime of Priscilla

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Milward, his executors and administrators should, within six months next after his decease, invest and transfer unto, and into the names of the trustees of the settlement, or the survivor of them, &c., the sum of 4,000*l.* capital stock in the 5 per cent. navy annuities in the proper transfer books of the Bank of England, upon trust to pay the interest, dividends and annual produce thereof unto Priscilla Milward and her assigns, for and during her natural life, and from and after her decease, upon the trusts therein mentioned for the benefit of the children of the intended marriage.

The marriage took effect shortly after the date of the settlement.

[\*312] \*In the year 1822, the navy 5 per cent. bank annuities were converted by act of Parliament into 4 per cent. bank annuities, and in the year 1825, the 4 per cent. bank annuities were converted by another act of Parliament into 3 1-2 per cent. bank annuities. Benjamin Milward had no stock in the navy 5 per cent. annuities at the date of the settlement, or at any subsequent period.

Benjamin Milward died intestate on the 17th of November, 1833, leaving his widow, Priscilla Milward, and Alfred Milward and Louisa Milward, children of the marriage, surviving him; and his widow took out administration to his estate.

The bill was filed on the part of the infant children, against Mrs. Milward and the trustees of the settlement, for the purpose of having the children made wards of the court, and the property, which was the subject of the settlement, secured for the benefit of Mrs. Milward and the children; and the question was, what sum, in consequence of the successive reduction of the navy 5 per cent. and 4 per cent. bank annuities, was, in pursuance of the trusts of the settlement, to be transferred into the names of the trustees.

Mr. *Pemberton*, for the plaintiffs:—By the 3 G. IV, c. 9, the navy 5 per cent. annuities were converted into new 4 per cent. annuities, and by the 3 G. IV, c. 61, s. 1, it was enacted, that in every case in which any person or persons should, at the time of the passing of that act, be or remain bound by the condition of any bond or obligation, or by the terms of any instrument in writing, or by any agreement or contract entered into

[\*313] before the passing of the 3 G. \*IV, c. 9, to transfer any amount of capital stock in the 5 per cent. annuities, the condition of every such bond or obligation, or the terms of every such instrument in writing or agreement, or contract, should be deemed in law and equity to be satisfied by making a transfer of 105*l.* capital stock in the new 4 per cent. annuities, for and in lieu of every 100*l.* capital stock in the said 5 per cent. annui-

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ties. By a subsequent act of the 11 G. IV, c. 13, the new 4 per cent. annuities were paid off, and converted into new 3 1-2 per cent. annuities; and by the seventeenth section of that act it is provided, that any contract or obligation to transfer any amount of capital stock in the said 4 per cent. annuities, shall be satisfied by making a transfer of an equal amount of capital stock in the new 3 1-2 per cent. annuities. This last act, therefore, substitutes, in all such cases of contracts, the 3 1-2 per cent. annuities for the extinguished new 4 per cent. annuities, and that substitution appears to be applicable by relation to the act of the 3 G. IV, c. 61, by which contracts to transfer stock in the navy 5 per cents., are declared to be satisfied by the transfer of a proportional amount of new 4 per cent. stock. There can be no doubt that, in passing the 11 G. IV, c. 13, it was the intention of the legislature to make 105*l.* of 3 1-2 per cent. annuities equivalent, in effectuating contracts, to 100*l.* of 5 per cent. annuities, in the same manner as 105*l.* of new 4 per cent. annuities were expressly declared by the previous act to be so equivalent. It is true that there is no express enactment to this effect, but this consequence follows by a necessary implication from the provisions in the successive acts of Parliament.

*Mr. Bickersteth, contra.*—The effect of the act converting 5 per cent. annuities into new 4 per cent. annuities, as explained by the \*subsequent enactment with respect to [314] contracts for transferring 5 per cent. annuities, is perfectly clear. Every contract entered into with reference to 5 per cent. annuities was to be satisfied by substituting 105*l.* of new 4 per cent. annuities for 100*l.* of the extinguished 5 per cent. stock; but there is no enactment which says that a contract made with reference to 5 per cent. annuities shall be satisfied by a substitution of new 3 1-2 per cent. annuities; and such substitution cannot be made by implication. By the act of the 11 G. IV, c. 13, the covenant of the settlor in the present case is controlled to this extent, that 4 per cent. stock shall be substituted in a given proportion for 5 per cent. stock, but the legislature has gone no further. Taking, therefore, the covenant so controlled to be for 4,200*l.* 4 per cent. stock, and there being an existing 4 per cent. stock, although the new 4 per cent. annuities are extinguished, the late case of *Banks v. Sladen*(a) is an authority to show that the investment should be made in an existing 4 per cent. stock, and not in the stock which has been reduced to 3 1-2 per cent. The legislature is silent, or, at any rate, has not with sufficient certainty expressed its meaning; and the court will not, without necessity, extend the operation of an act of which the direct and

(a) 1 Russ. &amp; Mylne, 216.

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unequivocal provisions have operated with great hardship upon persons who have been compelled to receive an amount of capital differing entirely from that which was intended to be the subject of contract. The covenant entered into by Mr. Milward should, therefore, it is submitted, be satisfied by the investment of a sum of 4,200*l.* in the existing 4 per cent. annuities.

THE MASTER OF THE ROLLS :—The act of the 3 G. IV, c. 9, expressly directs that the covenant of the testator shall [\*315] be fully satisfied by a \*transfer of 105*l.* in the new 4 per cent. annuities, for every 100*l.* covenanted to be transferred in navy 5 per cent. annuities. The act of the 11 G. IV, c. 13, directs that all obligations which then existed for the transfer of the new 4 per cent. annuities, shall be fully satisfied by the transfer of an equal share in the new 3 1-2 per cent. annuities. At the time of the passing of this act, the existing obligation in respect of the testator's covenant was to transfer a sum of 105*l.* of the new 4 per cents. for every 100*l.* of the navy 5 per cents. to which that covenant extended; and, consequently, that obligation will now be fully satisfied under that act by the transfer of an equal sum in the 3 1-2 per cent. annuities, or, in other words, by the transfer of a sum of 105*l.* in the new 3 1-2 per cent. annuities, for every 100*l.* navy 5 per cent. annuities to which the testator's covenant extended. Mrs. Milward will now sustain a considerable diminution of the 200*l.* a year, which no doubt it was the intention of the testator's covenant to secure to her. In order to have avoided the hardship which will thus be occasioned to Mrs. Milward by the two acts against the plain intention of her husband, the provisions of the acts ought only to have applied to cases where the party entering into an obligation for the transfer of stock was actually possessed of that stock at the time of the obligation.

[\*316]

\*BRIGHT v. ROWE.

ROLLS.—1834: 14th and 17th March.

A married woman, by a testamentary instrument made in execution of a power contained in her marriage settlement, gave 2,000*l.* subject to the life interest of her husband, to trustees upon trust for the benefit of her child or children, to be equally divided between them, share and share alike; but in case the 2,000*l.* should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust, to invest and apply the interest to their maintenance and education, and when they should attain twenty-one or day of marriage, to pay to them their respective shares of their principal; and in case any of the children should happen to die before their portions should become payable, then the same should go and belong to the survivors or survivor of them.

The testatrix left a son and two daughters, all of whom had attained twenty-one

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at her decease. The son, and afterwards a daughter, died in the lifetime of their father:

Held, that, on the death of the father, the surviving daughter was entitled to the 2,000*l.* by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which belonged to the representative of the deceased daughter.

By a settlement, dated the 16th of April, 1788, and made previously to the marriage of John Rowe and Mary Clarke, a sum of 2,000*l.* was vested in trustees, to be placed out in the public funds, or on good security, upon trust to pay the interest and dividends thereof to the husband for his life, and after his decease, in case the said Mary, his intended wife, should happen to survive him, upon trust to pay and apply the principal money and interest for the only proper use and benefit of the said Mary Clarke, her executors and administrators; but in case she should happen to die in the lifetime of John Rowe, her intended husband, then in trust for such person or persons as she should by deed or will appoint, and in default of appointment, for her executors and administrators.

The marriage took effect, and in October, 1789, Mrs. Rowe, having then given birth to a daughter, Mary Elizabeth, in pursuance of the power reserved by the settlement, executed a testamentary instrument, by which she appointed the sum of 2,000*l.* to two trustees, and the survivor, &c., upon trust, for the only use and benefit of her daughter, Mary Elizabeth Rowe, or any \*other child or children, whether son or sons, [\*317] daughter or daughters, which she might thereafter happen to have by her husband, John Rowe, to be equally divided between them, share and share alike; but it was her will and intention, and she did thereby direct, that in case the said sum of 2,000*l.* should become payable before her said daughter Mary Elizabeth should have attained her age of twenty-one years, or day of marriage, or before any other of her children, being a son, should have attained the like age, or, being a daughter or daughters, the same age or day of marriage, then the trustees or the survivor, &c., should place and lend out the same or such proportions thereof as should belong to any such children at interest on good security, or invest the same in the public funds, and pay and apply the interest and dividends and produce of each child's respective share thereof for and towards his or her better maintenance and education; and when any such children, being sons should attain the age of twenty-one years, or being daughters, the like age or day of marriage, upon trust to pay to them their respective shares of the principal, with the unapplied interest; and in case her said daughter Mary Elizabeth, or any other child she might thereafter happen to have by the said John Rowe, her husband, should happen to die before her, his or their portion or portions of the said 2,000*l.* should become payable, then the same

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should respectively go and belong to the survivors or survivor of them, and to, for or upon no other trust, intent or purpose whatsoever.

Mrs. Rowe died on the 3d of October, 1825, leaving three children, issue of the marriage, surviving her, Mary Elizabeth, John and Eliza Clarke Rowe, who had severally attained the age of twenty-one. John died in 1826 and Mary Elizabeth in 1829, both in the \*lifetime of their father, who died in 1833, leaving one child only, Eliza Clarke Rowe, surviving him.

The bill was filed by the husband and administrator of the deceased daughter, Mary Elizabeth Rowe, against the trustees of the settlement, the surviving daughter and representatives of the deceased son; and the question was whether the plaintiff was entitled to any and what part of the 2,000*l.*, or whether the whole of that sum vested in the defendant, Eliza Clarke Rowe, by survivorship.

Mr. Tinney and Mr. R. Perry, for the plaintiff:—The word “payable” is a word of ambiguous import, referring in one sense to the period at which a party shall have acquired a capacity to take, as at the decease of the testator, or at twenty-one or marriage, or other period expressly named by the testator, when it is equivalent to “vested;” and, in another sense, to the period at which the fund is to be actually paid, which may either coincide with the period of vesting; or be postponed, as where there is a prior life estate, and the actual payment is therefore necessarily postponed until the determination of that estate. In cases where portions are given to children at twenty-one or marriage, subject to the life interest of their parents, and the shares of the children are given to the survivors or survivor of them, or given over in case of any or all of them dying before their shares become payable, the court is always inclined to hold that the child acquires a vested and transmissible interest at twenty-one, if a son, and, on marriage or at that age, if a daughter, although there may be expressions in the instrument which render it difficult to refer the vesting of the child’s interest to any period, except \*that of the death of the tenant for life: *Emperor v. Rolfe*, (a) *Hope v. Lord Clifden*, (b) *Jeffreys v. Reynous*, (c) *Schenck v. Legh*, (d) *Powis v. Burdett*, (e) *King v. Hake*. (g)

The principle upon which these decisions have proceeded is, that in cases between parent and child, and where the main object of the instrument in question is to make a provision for chil-

(a) 1 Ves. sen. 208.

(b) 6 Ves. 499.

(c) 6 Bro. P. C. 398, Toml. ed.

(d) 9 Ves. 300.

(e) 9 Ves. 428.

(g) 9 Ves. 438.

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dren, there is always a strong presumption against an intention to defeat the interests of sons who have attained twenty-one or daughters who have married, and to leave their descendants, if any, unprovided for, because such sons or daughters may have had the misfortune to die in the lifetime of their parents; and the court will struggle, therefore, if necessary, with the language of the instrument, in order to come to a conclusion conformable with the natural intention. Applying this principle to the present case, there is no difficulty in the language of this testamentary instrument which is not easily surmounted; for the whole turns here, as in the case of *Hallifax v. Wilson*,<sup>(a)</sup> upon the meaning of the word "payable." The testatrix, in the first place, provides that, in case the 2,000*l.* should become payable before her daughter or any other child or children should have attained twenty-one or married, then the trustees should invest the proportions of such children for their maintenance and education till they should attain twenty-one or marry, when their shares were to be respectively paid to them. Here the word "payable," no doubt, refers to the period at which both the parents should have died, but it is used in a vague sense, neither implying a capacity to take in \*the appointees, nor indicating the [320] period at which the fund was to be actually divided, for the testatrix goes on to fix the period at which the children were to take vested interests, and at which, in the supposed case of the children having survived their parents, their shares were to be actually paid, namely, at twenty-one or marriage. She proceeds to provide that in case any of the children should happen to die before their portions should become payable, then the shares of the children so dying should go to the survivors or survivor of them. Here the word "payable" is used in the sense equivalent to "vested;" and is referred much more obviously and naturally to the period of payment or vesting which she had just fixed, namely, the age of twenty-one or marriage, than to the period of the death of the tenants for life. It cannot, at any rate, be said that there is in this will a clear, unambiguous intention to make the right of the children to their portions depend upon their surviving both parents, and unless there is such a clear unambiguous intention, the court will give effect to what must always be presumed to be the natural intention of parents in favor of their children: *Hougrave v. Cartier*,<sup>(b)</sup> *Perfect v. Lord Curzon*.<sup>(c)</sup>

Mr. Jacob for the defendants in the same interest with the plaintiff.

Mr. Campbell *contra*.—There is no ambiguity in the use of the

(a) 16 Ves. 168.

(b) 3 V. & B. 79.

(c) 5 Mad. 442.

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word "payable" in this instrument, for it clearly refers to the period at which both parents shall have died, and it is [\*321] expressly distinguished from the provision for \*payment at twenty-one or marriage, which was only to take place in case of the death of the parents before their sons should have attained twenty-one or the daughters should have attained that age or married. The sense of the word "payable," therefore, in this instrument, being free from doubt, and the disposition which the testatrix has made in the clause of survivorship being equally unequivocal, the court has no authority to control that disposition; *Perfect v. Lord Curzon*.(a) The recent case of *Crowder v. Stone*(b) bears a strong analogy to the present. There the testator, after giving a sum of stock to his executors upon trust to pay the dividends to his wife for life, and after her decease to his brother for life, directed the principal to be divided, after the decease of the survivor of the wife and brother, among his five nephews and nieces; and if any of them should die without issue before their respective shares should become payable, then he directed that the share of him, her, or them so dying without issue, should be equally divided among the survivor or survivors of them. One of the nieces died, leaving a son, who died without issue, before the period of distribution, and Lord Lyndhurst decided that her personal representative was not entitled to any portion of the fund.

Mr. Tinney in reply:—*Crowder v. Stone* has no application to the present case, because it does not belong to the class of cases between parent and child. If, however, the court should be of opinion that the claim of the plaintiff to an interest in one-third share of the 2,000*l.* cannot be sustained, and that the present case falls within the principle upon which *Crowder v. Stone* was decided, then [\*322] \*the plaintiff, whose wife survived her brother, John Rowe, will at least be entitled to the benefit of the rule as to accruing shares which is laid down in *Rudge v. Barker*(c) and *Ex parte West*.(d) and which was followed in *Crowder v. Stone*.

THE MASTER OF THE ROLLS:—The rule being that, when a testator has unequivocally expressed an intention, that a provision to be made for his children shall depend upon their surviving both their parents, the court must give effect to that intention, and can only lean to the presumption in favor of children, where the intention of the testator is ambiguously expressed. The single question for consideration in this case is, whether, upon the whole will, the testatrix has or has not clearly and un-

(a) 5 Mad. 442.

(b) 3 Russ. 217.

(c) Ca. Temp. Talb. 124.

(d) 1 Bro. C. C. 576.



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ambiguously expressed her intention in that respect. The expressions of the testatrix, are not to be subjected to any violence for the purpose of raising an implication in favor of the children; but the ambiguity must appear obviously upon the face of the will.

Mrs. Rowe having, by her marriage settlement, a power of appointing the principal sum of 2,000*l.* at the decease of her husband, if he should survive her, by a testamentary instrument directed that sum to be equally divided between the only child she then had, and any other child or children she might thereafter have by her husband. She considered that she might die, leaving these children under the age of twenty-one, or, being daughters, unmarried; and she, therefore, directed that, if the 2,000*l.* should become payable when the child then living, or any other child or children should be \*under [\*323] twenty-one or unmarried, the trustees should apply the proportions of such children for their maintenance and education, until they should attain twenty-one or marry, when their shares were to be paid to them. So far, there is a clear direction that the shares shall vest in the children at twenty-one, or marriage. But she also foresaw that another event might happen, namely, that the children, or some of them, might not be living at the time of the death of the husband; and she provides for that event, by directing that, if her daughter who was then living, or any child or children, she might thereafter have, should die before their portions of the 2,000*l.* became payable, then the same should go and belong to the survivors or survivor of them. I can see no ambiguity whatever here; but I am clearly of opinion that, by dying before their portions became payable, the testatrix meant dying in the lifetime of the husband; and that the shares of the children so dying are given to the survivors or survivor of them.

With respect to the share which accrued by survivorship to the deceased daughter, on the death of her brother John, there is certainly a class of cases according to which it has been decided, that the accruing shares shall not go to the survivors or survivor with the original shares; and, therefore, let it be declared, that the moiety of the brother's share, which went to the deceased daughter by accruer, belongs to the plaintiff, as her personal representative.

“His Honor doth declare that, according to the true construction of the will of Mary Rowe, the testatrix, the shares of her children of and in the sum of 2,000*l.* therein mentioned, vested in a son on his attaining \*the age of twenty-one [\*324] years, and in a daughter on her attaining that age, or day of marriage, with benefit of survivorship, in the event of the death of any of them, in the lifetime of John Rowe, the elder.

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His Honor doth declare that John Rowe, the son of the testatrix, having attained the age of twenty-one years, and having died in the lifetime of the said John Rowe, the elder, leaving his sisters Mary Elizabeth, the late wife of the plaintiff, and the defendant Eliza Clarke Rowe, who also severally attained the age of twenty-one years, him surviving, his third part or share of the said 2,000*l.* became vested in his said sisters equally; and his Honor doth declare that the said Mary Elizabeth, having afterwards died in the lifetime of the said John Rowe, the elder, leaving the defendant Eliza Clarke Rowe, her said sister, her surviving, the third part or share of the said Mary Elizabeth, of and in the said sum of 2,000*l.*, thereupon became vested in the said defendant, Eliza Clarke Rowe; but that the moiety of the said share of the said John Rowe, the son, which survived to her as aforesaid, belongs to the plaintiff as her present representative." Reg. Lib. A. 1833, fol. 747.

[\*325]

\*WHITTON v. PEACOCK.

ROLLS.—1834: 14th March and 23d May.

The surrenderee of a copyhold is an assignee of a reversion within the Statute of 32 Hen. VIII, c. 34, and may maintain an action of covenant upon a lease made by his surrenderor, and the defendant in such action cannot protect himself by alleging the invalidity of the lease.

The lord of the manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years.

Where one general exception, consisting of several distinct objections which are specified as the grounds of the exception, is taken to a report in favor of a title, and the court overrules the exception as to some of the objections, and allows it as to others, the deposit will be divided.

THE bill was filed to enforce the specific performance of a contract for the purchase, by the defendant from the plaintiff, of certain copyhold premises, being lots 2, 3 and 4, in the particular of sale described, held of the manor of Hornsey, of which manor the Bishop of London, in the right of his see, was the lord. On the application of the plaintiff, an order was made in the usual form, directing the Master to inquire and state whether the plaintiff could make a good title to the premises contracted to be sold.

It appeared from the abstract, that in November, 1732, one Joseph Storey, who was then seised in fee of a close of pasture called Hornsey Lane Field, being the copyhold premises in question, duly surrendered the same to Elizabeth Bennett by way of mortgage, to secure a sum of 400*l.* and interest. In the month of April, 1753, the mortgage money still remaining unpaid, Elizabeth Bennett completed her legal title as mortgagee, by obtaining admittance upon that surrender the equity of redemption

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having at the time become vested in Samuel Storey, the son of the aforesaid Joseph Storey. Elizabeth Bennett died some time previous to the month of March, 1755, having, by her will, dated the 18th of June, 1753, devised the premises to her nephew, Bennett Gerrard, in fee, but without having surrendered them to the use of her will. Bennett Gerrard and Samuel Storey, on the 15th March, 1755, joined in surrendering the premises \*to Bendal Martyn in fee, who on the same day was [\*326] admitted tenant, and thereupon made a surrender of the premises to the use of his will.

On the 11th of March, 1761, the lord of the manor of Hornsey granted license to Bendal Martyn, to demise the close in question, or any part thereof, from Christmas, 1760, for ninety-nine years, the said premises being intended to be improved by building, or for any less term. Bendal Martyn died soon afterwards, without having executed any lease of the premises, and by his will, dated the 25th of March, 1760, gave and devised the same unto Maria, the wife of Baker John Littlehales, in fee. On the 13th of April, 1762, Maria Littlehales was admitted tenant of the premises, and she and her husband, on the same day, surrendered them to the use of Baker John Littlehales in fee, who was thereupon admitted tenant.

By indenture of lease, dated the 2d of August, 1762, made between Baker John Littlehales of the one part, and Philip Keys, builder, of the other part, it was witnessed that Baker John Littlehales, and Maria, his wife, in pursuance and part performance of an agreement, dated the 18th of March, 1761, made between Bendal Martyn and Philip Keys, and by virtue of the aforesaid license by Bendal Martyn obtained of the lord of the manor for that purpose, demised unto Philip Keys, his executors, administrators and assigns, a piece of ground, parcel of the said premises, to hold the same to him, his executors, administrators and assigns, from Lady day, 1761, for ninety-eight years thence next ensuing, Philip Keys, his executors, &c., paying to B. J. Littlehales, his heirs and assigns, for the first two years, the rent of 1*l.*, and for the remaining ninety-six years the annual rent of 5*l.*; and Philip Keys thereby covenanted for himself, his executors, administrators and assigns, that he, \*his ex- [\*327] ecutors, administrators, or assigns, would, within six calendar months from the date thereof, complete and finish, fit for habitation, the messuage, tenement, buildings and erections then standing on the premises thereby demised, and sufficiently repair and uphold the same during the term. By another indenture of lease of the same date, and executed by the same parties, B. J. Littlehales, and Maria, his wife, in pursuance of the said license, demised another piece of ground, parcel of the said premises, for a similar term, at a like yearly rent of 5*l.*, and un

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der covenants similar in every respect to those contained in the before-mentioned lease.

On the 23d of May, 1770, Martha Leigh, who was the niece and customary heir of Elizabeth Bennett, and upon whom the title to the copyhold premises had devolved in consequence of Elizabeth Bennett not having surrendered them to the use of her will, was admitted tenant of the premises, to hold the same in fee; and in the month of February, 1772, Martha Leigh and her husband, Peter Leigh, surrendered the premises to the use of B. J. Littlehales in fee, who was thereupon admitted tenant accordingly.

By an indenture of lease, dated the 8d of July, 1773, made between B. J. Littlehales, and Maria, his wife, of the one part, and the said Philip Keys, of the other part, reciting the aforesaid two indentures of lease of the 2d of August, 1762, and that the parties thereto had come to a further agreement respecting the said Hornsey Lane Field, whereby they had agreed that the said Philip Keys should have the whole of the said field leased to him at the yearly rent of 10*l.* only, and that instead of cancelling the two former leases already granted of part thereof, [\*328] the same leases should remain, \*and another lease be granted of the residue of the said field, at the yearly ground-rent of 10*l.*, which should be considered the same as the two several rents of 5*l.* each, reserved by the said two leases, and that notwithstanding such several reservations, no more than the yearly rent of 10*l.* in the whole should be payable for the said field and the messuages or tenements erected thereon, it was witnessed, that in pursuance of the said agreement, and by virtue of the said license, and in consideration of the yearly rent and covenants thereafter reserved, the said B. J. Littlehales, and Maria, his wife did, demise, lease, and to farm let unto the said Philip Keys, his executors, &c., the said Hornsey Lane Field, except such parts thereof as had already been demised to him by the two several indentures aforesaid, to hold the same with the appurtenances unto the said Philip Keys, his executors, &c., from Lady day, 1761, for the term of ninety-eight years then next ensuing, paying for the first two years the rent of a peppercorn, and for the remaining ninety-six years, the yearly rent of 10*l.*, unto the said B. J. Littlehales, his heirs and assigns; and Philip Keys thereby for himself, his executors, administrators and assigns, covenanted with B. J. Littlehales, his heirs and assigns, that he, the said Philip Keys, his executors, administrators and assigns, would pay the said yearly rent of 10*l.* in the manner and at the times therein mentioned, and would also well and sufficiently repair and uphold the premises thereby demised, and every part thereof, as also all the messuages, tenements, or buildings which then were, or might be erected thereupon, with the

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usual clause of re-entry on default; and the indenture contained a proviso, that the yearly rent of 10*l.*, thereby reserved, was intended to be and was the same as the two several yearly rents of 5*l.* each, so respectively reserved by the two several indentures of lease before-mentioned.

\*By various subsequent surrenders and admittances, [\*329] the customary estate of inheritance of B. J. Littlehales and Maria his wife became vested in the plaintiff in fee.

No distinct evidence was adduced before the Master with respect to the existence or contents of the indenture of lease of the 3d of July, 1773, and the indenture itself was not forthcoming; but in other respects the plaintiff's title was clearly deduced in the manner already stated; and the Master having thereupon reported in favor of the title, the defendant took one general exception to the report, and specified five objections as the grounds of the exception. Of these objections, the first was founded on the insufficiency of the evidence as to the existence and contents of the lease of the 3d of July, 1773, and the rest, on the alleged invalidity of that and the two preceding leases of the 2d of August, 1762, to which the copyhold premises were subject.

The questions principally argued arose upon the second, third, and fourth objections, which, in substance, were severally as follows:—That it appears by the abstracts, that in the year 1761, a license was granted by the lord of the manor within which the premises in question lie, to Bendal Martyn, to demise a close of pasture, called Hornsey Lane Field, within the said manor, or any part thereof, from Christmas, 1760, for ninety-nine years, the said premises being intended to be improved by building, or for any less term; and that the said Bendal Martyn died without granting any lease of the said premises, having, by his will, dated the 25th day of March, 1760, devised the said copyhold close to Maria, the wife of Baker John Littlehales, who was admitted thereto, and afterwards concurred with the said

\*Baker John Littlehales in surrendering the same to the [\*330] use of her said husband, his heirs and assigns; and that in the year 1762, the said Baker John Littlehales granted two building leases, from Lady day, 1761, for ninety-eight years, of the ground on which two messuages, being respectively lots 2 and 3 in the particular of sale mentioned, were then or shortly afterwards built, at the rents of 5*l.* each; and that in the year 1772 a surrender was made of the legal estate in the said close, called Hornsey Lane Field, by Peter Leigh, and Martha his wife, to the said Baker John Littlehales in fee, on which he was admitted tenant. And the plaintiff alleges that Baker John Littlehales afterwards, by an indenture dated the 3d day of July, 1773, demised the said field, except such part only as had been before demised to Philip Keys, from Lady day, 1761, for a term of

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ninety-eight years, at a rent of 10*l*. The defendant therefore submits, that the license granted by the lord of the manor to Benda! Martyn, would not authorize the several leases said to have been granted by B. J. Littlehales, and consequently the common law reversion on such leases, or at least on the lease of July, 1773, (if any such was granted,) would not pass by the surrenders made by his co-heirs, so as to give their surrenderees the benefit of the covenants and conditions contained in such leases.

That supposing the license to have authorized the granting of leases by B. J. Littlehales, yet the alleged lease of the 3d of July, 1773, did not pursue the license, inasmuch as it contained no stipulation or agreement for building.

That by reason of Benda! Martyn not having been legal tenant to the lord at the time when the said license was granted to him, the license could not authorize the lease of the 3d of [331] \*July, 1773, alleged to have been executed by B. J. Littlehales after he became such legal tenant, on the surrender of Martha Leigh and her husband.

The fifth objection was abandoned at the bar.

Mr. *Pemberton* and Mr. *Coote*, in support of the exception :—The deficiency of evidence with respect to the existence and contents of the lease of the 3d of July, 1773, may possibly still be supplied before the Master; but any one of the other objections, if allowed, is absolutely fatal to the plaintiff's title. The license to Benda! Martyn to grant a lease was personal only, and the benefit of it could not extend to Littlehales, the husband of Martyn's devisee, who was a mere stranger. No express decision upon the point is to be found in the books; but from its very nature an authority granted to an individual is incapable of assignment, and cannot warrant the doing of the act by another person. A license to A cannot be construed as a license to A, his heirs and assigns; *Watkins on Copyholds*.(a) An authority of this kind, being in the nature of an indulgence, is always to be construed strictly; and special words ought to be introduced into it, in order to enable representatives to enjoy the benefit which it purports to confer. The leases, therefore, which Littlehales subsequently executed to Keys on the footing of the license, necessarily operated as a forfeiture to the lord.

Independently of this objection, however, the terms of the license have not been followed in the leases. The license [332] was of an extremely special nature; it is stated \*to have been a license to demise the close in question for ninety-nine years or a less term, "the said premises being intended to be improved by building;" whereas the third lease, that of July,

(a) Vol. II. p. 87, ed. by Coventry.

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1773, which applies to the premises in lot 4, did not contain any stipulation for building, and did not reserve any improved rent to the lessor; but, on the contrary, the same amount of rent was made payable in respect of all the lands comprised in the three leases, as had been theretofore reserved upon the two prior leases only. The third lease was in fact granted at a merely nominal rent. Upon these grounds the lord would clearly have a right to enter as for a forfeiture upon all or part of the copyhold lands; and even if the lord should decline to take advantage of the forfeiture, still, as the leases were a fraud upon the lord, and granted in derogation of his right, the lessor, or the plaintiff, as his assign, could maintain no action upon the covenants contained in them against the lessee or his assigns. It may be said, indeed, that the surrenderee of a copyhold is within the equity of the statute 32 Hen. VIII, chap. 34, which enacts that the grantees or assignees of reversions shall have such like and the same advantage against lessees, their executors, administrators and assigns, by entry for non-payment of rent, for doing waste or other forfeiture, and the same remedy by action only for not performing other conditions and covenants contained in the leases, as the lessors and grantors might have had. In *Glover v. Cope*,<sup>(a)</sup> which is supposed to have overruled *Brazier v. Beale*,<sup>(b)</sup> that doctrine certainly appears to be assumed; although it is difficult to see how, in point of principle, the surrenderee of a copyhold can be considered in the light of the grantee of a reversion. The lease in that case, however, was a valid lease originally, the copyhold tenant \*being substantially the owner, and the [\*333] lease itself being good without the assent of the lord. If, therefore, the leases in question had been duly granted or had been authorized by the custom, they might, on the authority of *Glover v. Cope*, have been, perhaps, unimpeachable. But can that authority apply to a case like the present, where the leases were granted without the license and in derogation of the rights of the lords, and were, therefore, absolutely void in their creation? It is still extremely doubtful at law whether a purchaser, as surrenderee of copyholds subject to such leases, would be capable of maintaining an action upon the covenants contained in them. The point was taken *arguendo* in *Doe v. Lufkin*,<sup>(c)</sup> but it was not necessary to decide the question.

Mr. *Bickersteth* and Mr. *Wigram*, for the vendor, submitted that no condition or stipulation was expressed in the license, which was of the most vague and general description; neither was there any pretence for saying that the whole of the land de-

(a) 4 Mod. 80.

(b) Yelv. 222.

(c) 4 East, 221.

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mised was to be built over. If, however, the granting of the leases had worked a forfeiture, that forfeiture had taken place more than sixty years ago, so that the benefit of it could not be taken advantage of by the lord, who must now be barred by the lapse of time; *Doe v. Hellier*.<sup>(a)</sup> unless, indeed, a fraud had been secretly practised upon him for the purpose of concealing the forfeiture; and that would hardly be alleged, as the granting of the leases was notorious, and the messuages were erected in such a way as to give ample notice to the lord, who stood by and made no objection; *Granger v. George*.<sup>(b)</sup> Upon the other point, the law had been settled by the case of *Glover v. Cope*.<sup>(c)</sup> [\*334] \*which ruled, that the surrenderee of a copyhold was within the equity of the Statute of Hen. VIII; and that being so, another settled principle then applied, namely, that a lessee could not be heard to dispute the title of his lessor; and that, though the plaintiff was only an assignee of the lessor, he might take advantage of the estoppel, because it ran with the land; *Palmer v. Elkins*.<sup>(d)</sup> No person was in existence, who, at this time of day, could effectually impeach the title of the plaintiff, or dispute the validity of the leases. The report, therefore, was substantially right, and the exception ought to be disallowed. With respect to the alleged defect of evidence touching the existence and nature of the lease of the 3d of July, 1773, no stress had been laid upon that objection until after the title was under the consideration of the Master, so that the vendor's attention had not been particularly drawn to it; but there could not be a doubt, that if the point was really considered of importance, and was meant to be insisted on, the plaintiff would be able within a very short period to furnish the required information.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS:—The material objection of the purchaser in this case is founded upon a doubt, whether he will be able to maintain actions of covenant on the three leases to which the premises intended to be purchased by him are subject. The case of *Glover v. Cope*.<sup>(e)</sup> has established, that the surrenderee of a copyhold is the assignee of a reversion within [\*335] the Statute of 32 Hen. VIII, \*and can, therefore, maintain actions on the covenants in a lease made by his predecessor. But it is argued that the leases in question are invalid, and that the doctrine in *Glover v. Cope*, has reference only to a valid lease. If it were admitted that these leases were invalid, that would be altogether immaterial, for it would be against all

(a) 3 T. R. 162.

(b) 5 B. & Cress. 149.

(c) 4 Mod. 80; 3 Lev. 326.

(d) 2 Stra. 817; 2 Ld. Raym. 1550.

(e) 4 Mod. 80.



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principle that a lessee should be permitted to defend himself against an action of covenant by the lessor or the assignee of the reversion, by alleging a defect in the title of the lessor; more especially in this case, where, if these leases were illegal, the lessee must be taken to have had full notice of the defect of the license under which the leases were granted, and of the consequent illegality. I concur in the opinion expressed by Lord Kenyon in *Doe v. Hellier*,<sup>(a)</sup> that the Statute of Limitations, which operates as a bar to other rights of entry after twenty years, would bar the lord in this case; and I am consequently of opinion, that the lord could not, at this distance of time, enter for a forfeiture if the leases were invalid.

With these views of the case, it is scarcely necessary for me to express any opinion as to the validity or invalidity of the leases. The first two leases are unobjectionable upon any ground, being building leases, and granted in consequence of contracts with the copyholder who obtained the license; and as to the third, I have no doubt, that by the custom of this manor, and probably of most other manors, the personal license to the copyholder runs with the land, and I cannot consider that the license was given upon condition that building leases only should be granted under it.

I must, therefore, overrule the exception as far as regards the last four objections to the title; but, being of opinion \*that the vendor is bound to supply the evidence upon [\*336] the insufficiency of which the first objection stated in the exception is grounded, I shall allow the exception so far as it applies to that point. As the excepting party, however, has succeeded upon one only of his objections, and that forming comparatively but a small part of the exceptions, and has failed upon all the rest, I shall direct the deposit to be divided.

*May 23d.*—Shortly afterwards, the objection founded on the insufficiency of the evidence of the existence and contents of the lease of the 3d of July, 1773, was removed by the discovery and production of the original lease itself.

The plaintiff then presented a petition, stating that fact, and praying that the defendant might be decreed specifically to perform his agreement. The defendant at the same time presented a cross petition, submitting that his exception to the title ought to have been allowed, not only upon the first ground, but also as regarded the objection which alleged that, from the circumstance of the legal title to the copyholds being outstanding in Martha Leigh at the time of the granting of the two leases of the 2d of August, 1762, by B. J. Littlehales, and being got in by B. J.

(a) 3 T. R. 162.

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Littlehales in the year 1772, the reversion in such leases would not pass by the surrenders made by the co-heirs of B. J. Littlehales, (under whom the plaintiff claimed,) so as to give to the surrenderees the benefit of the covenants and conditions contained in those leases. The petition therefore prayed, that with reference to the last mentioned objection, the exception might be reheard. The two petitions were brought to a hearing together.

[\*337] \*Mr. *Pemberton*, for the purchaser, said that the point which was now submitted to the court by the defendant's petition, was an extremely nice and important one. Though suggested in the second of the objections stated in the exception formerly discussed, it had, in the hurry of arguing a variety of different questions, been apparently overlooked by the defendant's counsel, and the attention of the court had never been distinctly called to it. If his Honor could not take it upon himself to decide the point, he would probably consider it a proper question to be submitted to a court of law.

Mr. *Bickersteth* and Mr. *Wigram*, *contra*, opposed the application, and contended that the plaintiff was now in a condition to entitle him to an immediate decree, according to the prayer of his petition. The objection now taken was entirely new; it had not been raised on the former exception, which had reference solely to the alleged defect in the license, and in the leases granted in pursuance of the license; but, although it had not been formally brought before the court, his Honor had, in fact, disposed of it in principle, when he decided that the lessee was not entitled to take advantage of a defect in his lessor's title. Whatever effect the circumstance of the copyholder not having the legal estate in him at the time when he executed the leases of August, 1762, might have upon their validity, those leases were certainly good by estoppel against the lessee and his assigns; and at any rate they were altogether merged in, or rather were absolutely confirmed by the lease of July, 1773, which was executed by Littlehales to the same lessee after the legal estate had been got in. To send the matter therefore to a court of law now, would occasion a heavy expense from which no practical result could be derived.

[\*338] \*The MASTER OF THE ROLLS said that, if the purchaser chose, he should direct a case confined to the single point raised by his petition; and the purchaser having elected to take it, a case was accordingly stated for the opinion of the Court of Common Pleas.

The case set out the title of the plaintiff as it has been already

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 1834.—*Bawtree v. Watson.*


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stated, (a) and the question for the opinion of the court was, "whether the plaintiff can maintain an action of covenant against the assigns of Philip Keys, for breach of the covenants contained in the leases of the 2d of August, 1762, or either of them."

The following certificate has since been returned :—"We have heard this case argued by counsel, and have considered it; and we think the plaintiff cannot maintain an action of covenant against the assigns of Philip Keys for breach of the covenants contained in either of the leases of the 2d of August, 1762.

"N. C. TINDAL,

"J. A. PARK,

"S. GASELEE,

"J. VAUGHAN."

(a) *Supra*, pp. 325-9.

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\**BAWTREE v. WATSON.*

[\*339]

ROLLS.—1834: 22d, 23d, 24th and 25th April.

The purchase of a reversion at an under value was set aside, and, under the special circumstances, was set aside with costs.

THE object of the suit was to avoid the sale of a reversionary interest in a copyhold estate, made by the plaintiff to the defendant, and to have an account taken of the pecuniary dealings and transactions between the parties.

The case made by the bill was one of gross fraud and oppression practised on the plaintiff by the defendant. The plaintiff, who was about twenty-four years of age, was represented as a person little acquainted with business, of feeble intellect, and one over whom the defendant possessed an almost absolute control; and the defendant was alleged to have used that control for the purpose of effecting the purchase of the property in question at an under value, and that, too, at a time when, by his own artful and underhand proceedings, he had involved the plaintiff in great pecuniary embarrassment, and had succeeded in throwing him into prison.

The dealings between the parties, both before and subsequently to the sale, were also set forth as tending materially to elucidate the nature of the transaction itself, and they were of a very special and complicated kind. The evidence in support of the various allegations with respect to the value of the property, the character and habits of the plaintiff, the influence of the defendant over the plaintiff's mind, and the peculiar circumstances attending the transaction, was so extremely voluminous, that the reading of it, and the comments upon it, occupied two

1834.—*Bawtree v. Watson.*

[\*340] entire days. The general bearing \*and effect of the whole are sufficiently stated in his Honor's judgment.

An objection was taken for want of parties, on the ground that Miss Harrison, who, under one of the transactions between the plaintiff and defendant, had become entitled to a mortgage over the property in question to secure an advance of 1,000*l.*, was not before the court; but, the plaintiff, undertaking by his counsel to confirm that mortgage, the objection was overruled, and the hearing of the cause proceeded.

Mr. *Pemberton* and Mr. *Hayter*, for the plaintiff.

Mr. *Bickersteth* and Mr. *W. C. L. Keene*, for the defendant.

HIS HONOR, at the close of Mr. *Pemberton's* reply, said it was perfectly clear, upon the evidence, that the plaintiff was entitled to the relief which he sought by his bill; and the only remaining question to be considered was as to the terms upon which the transaction ought to be set aside, whether at the cost of the plaintiff, or of the defendant; or whether, as an intermediate course, each party should be left to bear his own costs. Upon that point he should take a day to consider his judgment.

*April 25th.*—THE MASTER OF THE ROLLS:—In this case it is clear that the sale and all agreements connected with it must be avoided, upon the general rule of the court, that the price paid by the purchaser was not a full consideration. Not only was eight or nine years' purchase deducted from the value [\*341] put upon \*the estate in respect of the life of a person known to be in an advanced stage of a mortal disease, and who actually died within six months afterwards, but the defendant included in the price paid certain household furniture, and the stock and implements on the farm, which he estimated himself at 490*l.*

The only question in the cause is, whether the defendant shall be made to pay the costs of the suit. The rule of the court, that the purchaser of a reversionary interest, in order to support its title, must establish that the price paid was a full consideration, is founded upon the presumption that the parties dealing do not stand upon equal terms; that the vendor sells from the pressure of distress, and that the purchaser, who has not paid a full price, has taken advantage of that pressure. Where the inadequacy of price is the sole ground for the interference of the court, and the decree of the court is that the conveyance should stand as a security for the price, the suit is considered as in the nature of a bill of redemption, and the vendor is charged with the costs of the suit.

1834.—*Bawtree v. Watson.*

In the present case, it is to be considered that the plaintiff entered upon the occupation of the farm in question, at Lady day, 1829, under the assurance of the defendant, that he would assist him by borrowing for him, and lending to him the moneys necessary for carrying it on; and the defendant did accordingly, in the month of February, 1829, procure for the plaintiff a loan of 1,000*l.* on the mortgage of the farm from Miss Harrison, at the same time taking a mortgage to himself for another sum of 1,000*l.* which the defendant states to have been partly intended for his own indemnity, in respect of his joining in the security to Miss Harrison, and partly to cover the advances of money intended to be \*made by him personally to the plaintiff. [\*342] The pretence of indemnity is a mere color, as Miss Harrison's loan was secured on an estate worth more than double the amount. In the month of November, in the same year, the plaintiff is arrested for a sum of 30*l.*, and detainers are also lodged against him for two other sums, amounting to about 160*l.* It appears by the schedule to the defendant's answer, that in part payment of 1,000*l.*, for which he had taken the mortgage on the plaintiff's estate, he had advanced only 385*l.* He does not, however, advance, as he was bound to do, any further part of this sum of 1,000*l.* in payment of these debts; but he joins as one of the plaintiff's bail, and the plaintiff surrenders in discharge of his bail in the month of February, following.

In this month of February, we find the defendant, stating a case for the opinion of Mr. Morgan, the actuary, as to the value of the plaintiff's reversion; and that he had then at least conceived the design of purchasing this reversion cannot be doubted. In a very short period afterwards, we find that, in order to be liberated from prison, the plaintiff is induced to make to the defendant, the sale which it is the object of this suit to set aside. That the plaintiff, though not incompetent to bind himself by contract, was a person of weak capacity; and that the defendant had obtained very great, and, it may be said, unbounded influence and dominion over his mind, is apparent from all the facts of the case. That he fraudulently abused that influence, is plain from the nature of the three agreements, which the defendant obtained from the plaintiff when the latter was in prison in the month of April, 1830.

In the beginning of the month of April, 1831, the plaintiff, accompanied by the defendant, went to Harwich with \*the intention of sailing for Canada, in a ship in which [\*343] a passage had been engaged for him. There is no evidence that this intention of leaving the country for Canada, was formed by the plaintiff, on the suggestion of the defendant. But that the defendant paid the plaintiff's passage money and encouraged him in the voyage, and was also at the time desirous

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 1834.—Attorney-General v. Christ's Hospital.
 

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to keep him from his brother and friends, who were in search of him at Harwich, is proved by the evidence of Capt. Hepbern; and his motive for this conduct is sufficiently obvious. It is further to be observed, that there was at this time an unsettled account between the plaintiff and defendant, upon which it is reasonable to infer that a considerable balance was due to the plaintiff, and yet all that the defendant then proposed to do for him was to empower him to receive, when he arrived at Quebec, a sum of 30*l*.

Considering all these special circumstances, I am of opinion that the plaintiff is entitled to a decree with costs.

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[\*344] \*ATTORNEY-GENERAL v. CHRIST'S HOSPITAL.

ROLLS.—1834: 2d and 5th May.

Length of possession will not prevail against charitable trusts, where the land was purchased with notice of the trusts.

THIS information was filed on behalf of the parish of St. Andrew Undershaft, in the city of London, at the relation of certain inhabitants of the parish, for the purpose of recovering a messuage and piece of land in the county of Essex from the governors of Christ's Hospital.

The case stated in the information was, that in the year 1620, one Robert Bucke, a citizen of London, bequeathed a sum of 100*l*., upon certain charitable trusts, for the benefit of poor persons belonging to the parish of St. Andrew Undershaft; and that, shortly after his decease, his widow having added another sum of similar amount to the charity, the whole, together with 45*l*. contributed out of the parish chest, was, a few years afterwards, laid out in the purchase of the messuage and land in question, and the conveyance taken in the names of certain of the parishioners, who were described in the deed of conveyance as feoffees of the charity. In the year 1677, a person named Forster bought the property from the then feoffees at the price of 140*l*. Forster soon afterwards devised it by his will to the governors of Christ's Hospital; and that institution had continued in the undisturbed enjoyment of the rents and profits from the year 1680, to the present time.

Mr. *Pemberton* and Mr. *Hall*, for the relators, argued that, in a court of equity, Christ's Hospital must be held to have received distinct notice, that the property had been devoted by

[\*345] the donors to a particular charity, and \*could not be sold without a breach of trust. The conveyance to Forster, in which the conveying parties were described as feof-

fees for the parish, was of itself sufficient to fix him, and of course all volunteers claiming under him, with notice of the charitable trust impressed upon the property; and the presumption was that, as the hospital had declined to produce the deed, its contents, if produced, would fortify the inference drawn from this description.

Mr. *Bickersteth* and Mr. *Phillimore*, for the defendants, the governors of Christ's Hospital, submitted that after 150 years of undisturbed possession, it would be dangerous and unjust to deprive one charity of its property merely for the purpose of transferring it to another charity, unless the evidence identifying the property and establishing the breach of trust was irresistible. Here the trusts of the founder's will were by no means distinctly connected with the premises sought to be recovered; on the contrary, very great doubt and obscurity hung over the whole transaction. It was a fair presumption, therefore, and one which at this distance of time, the court would gladly entertain, that the sale made to Forster by the feoffees as representing the parish was not a breach of trust, but was made by them in exercise of their powers, and after having obtained the sanction and authority of the vestry; and that the consideration expressed to be paid upon the sale had in some way or other been applied for the benefit of the parishioners, although the exact application of it could not now be traced.

*May 5th.*—The title deeds of the property, which were in the hands of the defendants, were eventually produced, and it appeared on inspecting them, that the surviving feoffees who had sold the land in question in the year 1677 for 140*l.*, [\*346] as well as the person to whom the lands were then conveyed, had full notice upon the face of the conveyance that the land sold was held by the parties conveying in trust for the benefit of the poor of the parish; and that, although the sale was stated to be made under an order of the vestry, so that wilful fraud or concealment could not be imputed to the feoffees, there was no evidence whatever that the proceeds of the sale had been applied to the purposes of the charity, or to any other charitable purpose.

THE MASTER OF THE ROLLS:—If, consistently with the facts proved in this case, it were possible to presume a state of circumstances which would render the conveyance to Forster a legal transaction, and not a breach of trust, I should, after this great length of time, consider it to be my duty to raise such presumption; but that not being possible, the defendants, the governors of Christ's Hospital, must reconvey the land upon the trusts ex-

1834.—Attorney-General v. Stephens.

pressed by the donors of the money with which the land was purchased.

His Honor was at first inclined to direct that the sum of 140*l.* the amount of the purchase money, should be refunded by the parish, and paid to the defendants for the benefit of Christ's Hospital. It appeared, however, on inquiry, that rents and profits to the value of 40*l.* had been for many years annually received by that institution out of the estate, and that no account of such receipts was sought by the information. His Honor was therefore of opinion, that the defendants had no equity to call upon the parish to refund the money paid on the sale of the estate.

[\*347]

\*ATTORNEY-GENERAL v. STEPHENS.

ROLLS.—1834: 21st April.

A testator, who gave a legacy for charitable purposes to be executed in a foreign country, named as one of the trustees of the charity an officer created by act of Parliament, describing him by his office and not by his name. The act of Parliament having been repealed, and the office abolished, the court referred it to the Master to approve of a proper person to be a trustee in his stead.

THE will of John James Stephens, late of Lisbon, in the kingdom of Portugal, made in that city on the 25th of May, 1825, contained among others, the following clause:—

"To the British Consul-General and treasurer of the British Contribution Fund in Lisbon, I give and bequeath in trust my 10,500*l.* new 4 per cent. annuities, transferable at the Bank of England, the interest of which, 420*l.*, to be paid to my deserving friends and acquaintance hereunder mentioned, during their natural lives, in the following manner, namely; to Mrs. Elizabeth Carrett, whose character and behavior I always regarded and respected, 80*l.* sterling; after her death to her daughters, Ann and Lucretia, in equal shares, and to the survivor of them; to Mrs. Susanna Koster, 80*l.*, after her death to her daughters in equal shares, with survivorship; to the daughters of Samuel Aislabe, 25*l.* each; to the daughters of John Skeys, 25*l.* each; to the daughters of Daniel Parminter, 20*l.* each; to the daughters of James Brander, 40*l.* each, with survivorship; to Mary French 10*l.*; to Sarah Bernard, 10*l.*; to George Price, 10*l.*; to Maria Carman da Cunha Alcafforade and her mother, 50*l.* between them, with benefit of survivorship. These appointments, making 420*l.* sterling, receivable in half yearly dividends, the 5th of January and 5th of July, are regularly paid at the bank; and as the lives of those my annuitants drop off, the same to devolve to the British consul, merchants and factors, to bestow at their



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discretion at public meetings by plurality of votes, to such widows and orphans as may by petition apply \*for [\*348] relief, to be granted only *durante bene placito*, that in case of misconduct the allowance to such pensioners may be withdrawn; reserving, however, on the demise of French and Bernard, the respective sums to bestow annually at 5% each to two men or two women, Portuguese or Spanish servants, who may have served in the families of British subjects upwards of ten years, with unimpeached characters; the candidates to apply by petition to the consul, and the distribution to be determined by a plurality of votes at a general meeting."

By the 8 G. I, c. 17, certain duties were imposed on merchandise imported into Portugal. Those duties were to be paid to a treasurer appointed at a general meeting of the Consul-General and British merchants and factors residing in Portugal, and were to be applied for the charitable purposes mentioned in the act, under the superintendence and direction of the said Consul-General and British merchants and factors. The fund thus created was called the British Contribution Fund.

By the 6 G. IV, c. 87, s. 17, this act of 8 G. I, was repealed, and the office of treasurer under the act consequently ceased.

The testator's will was made before the passing of the 6 G. IV, c. 87, which received the royal assent on the 5th day of July, 1825; but his death did not take place until the 12th of November, in the following year.

The information was filed by the Attorney-General at the relation of James Robert Matthews, his Majesty's Consul-General at Lisbon; and it prayed that the aforesaid bequest might be established, that the defendant, Charles Lyne Stephens, the executor and residuary legatee under the will, might be directed to transfer \*the legacy of stock into the name [\*349] of the Accountant-General, and that, if necessary, a scheme might be settled for the future administration of the charity.

Mr. Wray, in support of the information, stated that the charitable society denominated the British Contribution Fund, constituted under the authority of the 8 G. I, having been abolished by a recent act of Parliament, no such officer as the treasurer of that fund now existed; and as the British Consul General at Lisbon, who was the present relator, objected to acting alone in the execution of the trusts, it had become necessary to apply to the court in order to obtain the appointment of new trustees, as also to receive, through the medium of a scheme, directions for the guidance of those trustees in the future management of the charity. Of the jurisdiction of the court over a charity to be administered abroad, and for the benefit of foreigners, there

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could be no doubt, provided, as in the present case, the fund was in this country; *Attorney-General v. Lepine*.<sup>(a)</sup> It had also been fully settled by the judgment of Lord Thurlow in *The Attorney-General v. The Mayor of London*,<sup>(b)</sup> that where a charity, in consequence of any accidental failure of objects of trustees, would otherwise be in danger of not taking effect, the court was empowered to direct a new scheme, or to appoint trustees as occasion might require.

Mr. Pemberton and Mr. Purvis, *contra*.—The application of the dividends is to be made in Portugal, and for the benefit of widows and orphans in that country. This, therefore, is strictly a foreign charity; and the distribution of its funds [\*350] ought, as the \*executor submits, to be left to his bounty and discretion, and not to be made under the dictation and control of his Majesty's Attorney-General. Where a charitable trust is to be executed abroad, this court neither can nor will undertake to superintend it; nor will it even direct the settlement of a scheme for the administration of the fund. And the reason is obvious; any officers or trustees whom the court might appoint for that purpose, besides being necessarily exempt from its jurisdiction, could derive no authority from its orders, and would be amenable to foreign laws, which might possibly be altogether hostile to the charity and its objects. Upon that rational principle, the decree in *Attorney-General v. Lepine* was reversed by Lord Eldon on appeal,<sup>(c)</sup> his Lordship being of opinion, that the administration of a charity in a foreign country must be left to the laws of that country to deal with. There is nothing in *The Attorney-General v. The Mayor of London*, inconsistent with that doctrine. That was the case of a bequest of a residue for the advancement of the Christian religion; and the trustees, who resided in England, had exercised their discretion under the sanction of the court, by appropriating a portion of the fund to a college in Virginia, subject to certain trusts for the promotion of Christianity among the Indians, and when that college ceased, on the American Revolution, to be within the British dominions, the court, considering it to be essentially an English charity, directed that the particular purposes should be changed, and that a new application of the funds should be made, upon the principle of *cypres*, for an analogous object. This testator has delegated the execution of the trusts to a particular body constituted by act of Parliament, and acting through the medium of persons holding particular offices. That [\*351] \*body and those offices have been abolished; the trus-

(a) 19 Ves. 309; 2 Swan. 181. And see *Emery v. Hill*, 1 Russ. 112.

(b) 3 Bro. C. C. 171.

(c) 2 Swan. 181.

tees who were to receive and administer the testator's bounty, no longer exist; the contribution fund itself no longer exists: the whole of the machinery through which his bounty was to be distributed according to a sound discretion, has been swept away; and the question now is, whether as the specific purposes have wholly failed in consequence of the abolition, by act of Parliament, of the British Contribution Fund, and the society by whom that fund was managed, this court can substitute other purposes and a different machinery, according to the doctrine of *cypres*, in a case where the charity is to be exercised out of the jurisdiction, and for the benefit of foreigners. Even if this were a charitable trust to be administered in England, it might be doubted whether, having regard to the very peculiar nature of the trusts, and the special means pointed out for its administration, this court would be authorized, under the circumstances, in directing the charity to be executed *cypres*. But, at any rate, it has never been decided, and all principle is against the decision, that such an execution can be decreed in the case of a foreign charity, as to which the appointment of new trustees and the settlement of a scheme would of course be wholly nugatory.

THE MASTER OF THE ROLLS:—It is to be inferred, that it was the purpose of the testator, that his charities should be administered by the same consul, merchants and factors, who, at the time when he made his will, administered the British Contribution Fund; but it by no means follows, that because that fund has ceased to exist, his charitable purposes are to fail. The British consul, merchants and factors, in Portugal, are legally competent to administer his \*legacy for the [\*352] charitable purposes mentioned in his will; they do not derive their competency from the 8 G. I, and would have been fully competent if that statute had never been passed. The repeal of the statute has put an end to the British Contribution Fund, but the charitable bequest given by the testator, can, in no manner be affected by that circumstance. There is nothing in the will expressive of an intention on the part of the testator that the legacy should fail, if the British Contribution Fund should cease. He meant to place his legacy under the same management as that fund, and this he had a legal right to do without reference to any act of Parliament.

It is true that the testator has named as trustee, an officer, who, in his official character no longer exists, and his intended trust in that respect fails; but the failure of a trustee will be supplied by this court, and it must, therefore, be referred to the Master, to approve of a proper person to be a trustee of this charity jointly with the relator.

1834.—Owen v. Thomas.

[\*353]

\*OWEN v. THOMAS.

ROLLS.—1834: 6th June.

An agreement in writing for the sale of a house, did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement. The court held the agreement sufficiently certain, if it could be ascertained by an inquiry before the Master, that the deeds in the possession of the person named referred to the house in question.

The court cannot sanction an agreement between the parties, that an objection for want of a proper stamp shall be waived; if, therefore, the objection comes to the knowledge of the court, no decree will be made until the instrument, duly stamped, is produced to the registrar.

THE defendant, who was possessed of a leasehold house at Newport, in Monmouthshire, entered into a parol agreement for the sale of the house to the plaintiff, at the price of 1,000 guineas. As soon as the agreement was concluded, the plaintiff, by the direction of the defendant, wrote and sent by post to Mr. Church, the defendant's solicitor, the following letter, to which the defendant, having previously read it over, affixed his signature:—  
 "To Samuel Church, Esq., Brecon.—Aber, 7th of February, 1828.—Dear Sir, I have this day sold the house, &c., in Newport to Mr. John Owen, for 1,000 guineas, and I am to receive the next half year's rent; the money to be paid as soon as the deeds can be had from Mr. Deere; and you will be pleased to lose no time in getting them from him. I am, &c.

ROWLAND THOMAS.

The bill was filed by the purchaser against the vendor, for a specific performance of this agreement; and the defendant having died before putting in an answer, the suit was revived against his wife and personal representative.

The wife, by her answer, set up a case of fraud and imposition on the part of the plaintiff, but went into no evidence. In support of the bill the only evidence adduced was the before stated letter, which was admitted.

Mr. *Bickersteth* and Mr. *Lynch*, for the plaintiff, submitted that the defendant's letter to his solicitor, being signed  
 [\*854] by him, was sufficient evidence of an \*agreement within the Statute of Frauds; and that if the subject and terms of the contract were not considered to be stated with sufficient precision in the letter, they might, at all events, be reduced to certainty, by a reference to the deeds mentioned in the letter, as to which, if required, the court would direct an inquiry. It was not necessary that the agreement should be signed by the party who sought to enforce it; *Boys v. Ayerest*,<sup>(a)</sup> *Palmer v. Scott*,<sup>(b)</sup> *Fowle v. Freeman*.<sup>(c)</sup>

(a) 6 Mad. 316.

(b) 1 Russ. &amp; Mylne, 391.

(c) 9 Ves. 351; and better reported in 1 Sug. V. &amp; P. 87, 9th ed.

1834.—Owen v. Thomas.

Mr. *Pemberton* and Mr. *Richards*, *contra*.—In order to be within the Statute of Frauds, there must be an agreement signed by the party who is sought to be charged, such as existed in *Fowle v. Freeman*, where the memorandum, however informal, amounted to a distinct contract. But this letter is not a contract or anything like a contract. It is merely the statement or recital of a transaction made by a gentleman for the information of his own solicitor, and there is no authority for holding, that a paper of this description, though signed by the party, is an agreement which a court of equity will enforce: no action could be maintained upon it at law. This point was considered by Lord Eldon, in a case of the *Marquis Townshend v. The Bishop of Norwich*, which is shortly mentioned, as to another point, in a note to Mr. Jacob's edition of Roper's *Law of Husband and Wife*.<sup>(a)</sup> The case related to the sale of a presentation to a living, of which the incumbent died before the conveyance was executed; and upon the refusal of the bishop to sanction the transaction, the question arose whether there \*existed a valid agreement before the death of the [355] incumbent. No written contract had been executed; but a draft of the conveyance, which recited the agreement in the usual terms, had been prepared, and approved by the agents on both sides, and it was then insisted that, according to the Statute of Frauds, it was only necessary that there should be evidence of the contract in writing. Lord Eldon, however, said there must be an agreement in writing, and that the mere preparation and approval of a draft conveyance did not amount to such an agreement as would be binding on the parties; *Whaley v. Bagnet*,<sup>(b)</sup> *Cooke v. Tombs*,<sup>(c)</sup>

The language of the letter, assuming it to amount to an agreement, within the Statute of Frauds, is far too vague in its terms for the court to act upon: neither specifies the subject of the sale, nor the quantity of interest to be conveyed. If the plaintiff, in order to give it certainty, has recourse to the statement contained in the answer, it will be found that Thomas had no more than an equitable interest in the messuage, being merely a mortgagee; and the defendant having, therefore, merely a mortgage title, the court, by decreeing a conveyance of the estate, would authorize a breach of trust. Besides, there is nothing to show that this letter was sent to the solicitor for the purpose of evidencing the contract; nor has it even been proved that, before it was sent off, its contents were communicated to the plaintiff.

Mr. *Bickersteth*, in reply:—All that is required by the fourth section of the Statute of Frauds is, that upon any contract or

<sup>(a)</sup> 1 Rop. H. & W. by Jac. 308, n.<sup>(c)</sup> 2 Anst. 420.<sup>(b)</sup> 1 Bro. P. C. 345, Toml. ed.

1834.—Owen v. Thomas.

sale of lands, or of any interest therein, the agreement [\*356] or \*some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith. The letter, here, is a distinct note in writing of the agreement for the sale, and it is signed by the person whose representative is now called upon to complete the contract. In *Coles v. Trecothick*, (a) the memorandum relied upon was a mere receipt for the purchase money. The objection founded on the vendor's defective title, is at once removed by the consent of the plaintiff to be satisfied with a conveyance of all such interest as the defendant can lawfully give. It is absurd to pretend that the purport of the letter was not made known to the plaintiff, seeing that it was drawn up in his own handwriting; a fact alleged in the bill, and not denied by the answer, which, though not proved by any evidence in the cause, may, if material, be easily ascertained by an inquiry.

THE MASTER OF THE ROLLS:—This letter from Rowland Thomas to his solicitor, was written to apprise him of the agreement, into which he had entered with the plaintiff, in order that the solicitor might take the necessary measures to carry it into execution, and is a sufficient memorandum or note of the agreement in writing within the Statute of Frauds. It is true that the agreement must be certain in its terms; but *id certum est quod certum reddi potest*. It appears, upon the face of the agreement, that the house referred to is the house of which the deeds were in the possession of Mr. Deere, and the house might easily be ascertained before the Master. The defendant, however, having declined the inquiry, in effect admits that any uncertainty [\*357] as to the subject of the agreement would \*be thereby removed; and the plaintiff is, therefore, entitled to the decree which he asks.

In the course of the argument, it came out, that the letter was not stamped as an agreement; and that the defendant's solicitor had entered into a written engagement not to take any objection upon that ground.

His HONOR expressed great disapprobation of this proceeding, considering it to amount to a combination to defraud the revenue, which it was the duty of the court to protect. It was impossible, therefore, for him to sanction it, and he felt strongly inclined to dismiss the bill.

Mr. *Bickersteth* observed, that if the court itself chose to take

(a) 9 Ves. 234.

1833.—*Knight v. Davis.*

and insist upon the objection, still it was not too late to remove it, provided the plaintiff was, in other respects entitled to a decree. It would be only necessary to let the cause stand over for a few days, to give the plaintiff an opportunity to get the instrument properly stamped, according to the course suggested in *Huddleston v. Briscoe*, (a) and actually taken in *Coles v. Trecothick*. (b)

The MASTER OF THE ROLLS ultimately directed, that the decree for specific performance of the agreement should not be drawn up until the letter, duly stamped, was produced to the registrar. (c)

(a) 11 Ves. 583.  
(b) 9 Ves. 234.

(c) See *Chervel v. Jones*, 6 Maa. 267.

\*KNIGHT v. DAVIS.

[\*358]

ROLLS.—1833: 21st November.

Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and, if the executor fail to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator.

BETTY TOGHILL, by a codicil to her will, dated the 23d of March, 1825, after reciting that under and by virtue of the will of the Rev. Moses Toghill, deceased, she was entitled to the sum of 1,000*l.*, gave and bequeathed the sum of 500*l.*, part of the said legacy of 1,000*l.*, to her son in law, the plaintiff, Thomas Knight; and as to the residue of the said sum of 1,000*l.*, being 500*l.*, she gave and bequeathed the same to her son William, to be paid to him at such times, and in such proportions, as the executors named in her will should think proper.

By an indenture, dated the 26th of March, 1825, between Betty Toghill of the first part, the plaintiff, Thomas Knight, of the second part, and Jonathan Corbett and Henry Williams of the third part, reciting among other things, the will of Moses Toghill as to the bequest of the legacy of 1,000*l.* to Betty Toghill, it was witnessed that, in consideration of 500*l.* paid to Betty Toghill by Corbett and Williams, Betty Toghill assigned to Corbett and Williams, their executors, &c., the legacy of 1,000*l.* and interest, subject to redemption upon payment by Betty Toghill of the sum of 500*l.* with interest at 5 per cent. The deed contained a covenant on the part of Betty Toghill and Thomas Knight to repay the said sum of 500*l.* and interest on the day and at the time appointed for payment thereof, and a power of sale was given by the deed to the mortgagees.

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Betty Toghill died soon after the execution of this deed; and the executors of Moses Toghill paid the legacy of 1,000*l.* [\*359] to her executors. After satisfaction of the \*mortgage of 500*l.* and interest, charged upon this legacy, and payment of the legacy duty, there remained in the hands of the executors of Mrs. Toghill the sum of 428*l.*, in respect of the legacy of 1,000*l.*

At the hearing of the cause, it was referred to the Master to inquire under what circumstances the mortgage for 500*l.* was executed by Mrs. Toghill; and the Master found that it was raised by Mrs. Toghill for the purpose of assisting Thomas Knight, and that the mortgage money was received by Thomas Knight, and applied by him to his own use.

William Toghill, the legatee of the other sum of 500*l.*, died shortly after the decease of the testatrix; and the question raised by his representative was, whether he was not entitled to the legacy of 500*l.* without any deduction, except in respect of legacy duty.

Mr. *Bickersteth* and Mr. *Bethell*, for the executors of Betty Toghill, submitted whether, as this mortgage had been made for the purpose of assisting Knight, and, after paying off the mortgage and interest, and charges, no more than the sum of 423*l.* remaine in the hands of the executors, the deficiency in respect of the legacy given to William Toghill, ought to be made good out of the personal estate of Mrs. Toghill. The testatrix had charged the legacy of 1,000*l.* given to her by Moses Toghill with this mortgage; and it seemed that the deficiency occasioned by that charge must be considered as an ademption *pro tanto* of the legacy given by her to her son.

Mr. *Pemberton* and Mr. *Kindersley* for the representative [\*360] of William Toghill:—\*A specific legacy, if it do not remain in specie at the death of the testator, is adeemed; *Ashburner v. Macguire*; (a) but where a specific legacy is only pledged or charged by the testator, the legacy remains, and the specific legatee is entitled to have the pledge redeemed or the charge satisfied out of the general estate of the testator. This distinction, which is borrowed from the civil law, is thus stated by Swinburne: (b) "If the thing bequeathed be not fully alienated, as if it be pledged or pawned, the legacy is not thereby extinguished; and, therefore, the executor, in this case, is bound to redeem the same, and to restore it to the legatary; or to pay the price thereof, if he suffer it to be forfeited." Thus, if a man bequeaths a gold cup, and afterwards pawns it, the legatee will be entitled to have the cup

(a) 2 Bro. C. C. 108.

(b) Swinb. on Wills, pt. 7, s. 20.



redeemed out of the testator's assets ; and there is no difference between the case of a cup and an outstanding debt. Where a man devises his real estate, and afterwards charges it, this is no revocation in equity, though it is at law ; and with respect to personalty, it is no revocation even at law. The mortgage transaction was no act of bounty to Knight, who remains bound to indemnify the estate of the testatrix.

Mr. *Bickersteth*, in reply :—The power of entirely destroying the subject of the specific legacy was given by the testatrix, for the mortgage deed contained a power of sale, and that power was in part exercised. Suppose, to pursue the illustration suggested on the other side, that two gold cups were bequeathed, and afterwards pledged, with a power to the pawnee of selling them both, and that one of the cups is sold by the pawnee in satisfaction of his debt, \*and that the other remains as a [\*861] part of the subject of the specific legacy. The part which remains *in specie* may go according to the will, but this court cannot give an equivalent for a specific thing or portion of a specific thing which is destroyed. The act by which the specific legacy of 500*l.* has been reduced to 423*l.* was as much the act of the testatrix as the original gift ; and the claim to have the difference paid out of the general estate of the testatrix cannot, therefore, be sustained.

THE MASTER OF THE ROLLS :—Where a specific legacy is pledged by the testator, the specific legatee is entitled to have his specific legacy redeemed ; and if the executor fail to perform that duty, the specific legatee is entitled to compensation to the amount of the legacy, against the general assets of the testator. The rule borrowed from the civil law, is that a specific legatee, if his legacy is charged with a mortgage or other charge, is entitled to have the charge paid off by the executor out of the general assets of the testator ; and if that be not done, he is entitled to stand in the same situation as if the duty of the executor had been performed. Knight cannot claim the legacy given to him, as the executor of the testatrix has a claim against him to the same amount. The same principle applies to specific legatees as to devisees of real estate, in respect of the redemption of the subject of the gift out of the general assets of the testator.

1834.—Attorney-General v. Wilson.

## [\*362] \*ATTORNEY-GENERAL v. WILSON.

ROLLS.—1834: 18th and 19th February, and 4th March.

The heir is excluded from the increased rent of an estate devised to a charity, if in express terms the whole profits of the estate are devised to charitable uses, or if the charitable uses mentioned in the will exhaust the whole actual rent at the time of the devise.

DOROTHY WILSON, by her will dated the 20th of January, 1710, gave, devised and bequeathed all her messuages, lands, tenements and hereditaments whatsoever, situate in the city of York, and at Nun Monckton, Eastington and Portington, or elsewhere in the county of York, city of York, or county of the said city, or elsewhere in the kingdom of England, unto her trustees therein named, Thomas Harrison, Timothy Hudson, their heirs and assigns forever, upon the special trust and confidence thereafter particularly mentioned and expressed. And she thereby expressly ordered and directed, that her executors thereafter mentioned, with all convenient speed after her decease, should lay out and expend so much of her personal estate, as should be necessary in the purchase of lands, tenements and hereditaments of inheritance in fee simple, in the county of York, of the annual value of 66*l.* beyond reprises; and she thereby directed that the said lands, tenements and hereditaments should be purchased in the names of her said trustees, and to the use of them, their heirs and assigns forever, upon the special trust and confidence that her said trustees and their successors should annually, out of the annual rents and profits, as well of the lands, tenements and hereditaments so devised by her as aforesaid, as of the lands, tenements and hereditaments so to be purchased as aforesaid, pay, or cause to be paid unto ten poor women, such as her said trustees, or the majority of them should think fit, to each of them 6*l.* 10*s.* per annum, quarterly, at Christmas, Lady day, Midsummer and Michaelmas, by four equal quarterly payments forever; and that her said trustees, \*or the majority of them, as often as any of the said ten poor women should depart this life, or should be deprived of the said charity for immorality or otherwise, should, before the then next ensuing quarter day, choose another into such place so vacant, that the number might be always full; and to three poor blind men or women successively forever, such as her trustees should think fit, the sum of 40*s.* per annum, out of the profits of the said premises, to be paid to them quarterly as aforesaid. And her will and mind was, that her trustees and their successors should, at the said four quarter days annually, pay or cause to be paid unto such person and persons successively forever, as they or a majority of them should think fit and proper for that end and purpose, out of the rents, issues and profits of the said

premises, the full sum of 20*l.* per annum, by four equal quarterly payments, to the intent and purpose that such person and his successors should forever thereafter, teach and instruct twenty poor boys, such as the trustees or the majority of them should elect, nominate and appoint, in such necessary learning as should be thought convenient for them by her trustees, in such a convenient place in her house at Foss Bridge-end in York, as should be set apart for that purpose; and that the said schoolmaster should, twice a day, viz., every morning and evening, read the common prayers, according to the rubric of the church of England, (Sundays excepted,) in the said place forever. And she directed her trustees and their successors once a year, viz., at Christmas, to lay out in apparel for each of the said boys, 20*s.* a piece forever out of the annual profits of the premises; and she further ordered and appointed her trustees to pay, or cause to be paid to such person and persons annually, as Elizabeth Smith, wife of John Smith, should nominate and appoint, the sum of 6*l.*, by four equal quarterly payments, during the term of the natural life of the said \*Elizabeth Smith, to the [\*364] intent and purpose that the same might be at the sole disposal of the said Elizabeth Smith, and not liable to the debts, forfeiture, or intermeddling of the said John Smith, her husband; and also that her trustees should pay, or cause to be paid out of the annual profits of the said premises, the further sum of 5*l.* per annum, unto Elinor Wilson, during the term of her life, towards her support and maintenance. And her will and mind was, that her trustees and their successors should annually forever pay out of the profits of the said premises unto the minister of St. Dennis parish for the time being, the sum of 10*s.*, for preaching an anniversary sermon upon the day of her decease; and to the schoolmaster of Nun Monckton for the time being forever, out of the rents and profits of the premises, the annual sum of 5*l.*, at the said four quarter days above mentioned as aforesaid, for teaching twelve children of such parishioners of the parish of Nun Monckton gratis, as her trustees, or the majority of them, should nominate and appoint, the first payment to commence as soon as a proper place was set out and erected for a school by the parishioners of the said parish. And her will and mind was, that her trustees should, within the space of six months next after her decease, fit and prepare her said house at Foss Bridge-end, for the convenient reception of ten poor women, in the best manner they could, to be an hospital forever, and build a school there for the said poor boys. And she thereby ordered and appointed, that William Metcalfe should be the acting trustee, and no other person, during the term of his natural life; and that he and such other person or persons as her trustees, or the majority of them should appoint and empower

for that purpose after his decease, should annually retain in his or their own hands, and for his and their own use, the sum of 10*l.* out of the profits of the premises, as a reward or [\*365] salary for the \*trouble he and they should have and take as steward of the premises. And after bequeathing several pecuniary legacies to the trustees of the parish of St. Dennis in Walmgate, she gave the sum of 40*l.*, on condition that they should advance the sum of 20*l.*, formerly given the said parish by her late brother, and lay out as well the said 20*l.*, as the said 40*l.*, in a purchase of lands of inheritance in fee simple, for the use and benefit of the poor of the said parish of St. Dennis, and not otherwise, to be distributed to the poor of the said parish in bread, as often as a sermon should be preached in the parish church there. And in case the poor daughter of Anthony Wilson, late of Hull, survived her said legatee, Elinor Wilson, then, and not otherwise, from and after the decease of the said Elinor Wilson, she gave and devised, out of the profits of the said lands and premises, unto the said daughter of Anthony Wilson, the annual sum of 5*l.* during the term of her natural life, to be paid her by her trustees at the said four quarter days above mentioned, by four equal quarterly payments. And her will and mind was, that from and after the decease of Elizabeth Smith, the profits of the said premises so paid to her as aforesaid during her life, should forever afterwards be applied for and towards the repairs and improvements of the fabric of the said hospital and school, and also that the profits of the premises so paid as aforesaid to Elinor Wilson, and the daughter of Anthony Wilson, during their respective lives, be immediately after the decease of the survivor of them forever thereafter laid out and employed for the same purpose. And she gave and bequeathed unto the parson of St. Dennis parish aforesaid, that should preach her funeral sermon, 10*s.* All the residue of her personal estate, her debts, legacies and funeral expenses, first paid and discharged, she gave and bequeathed unto William Metcalfe and Timothy Hudson, and made the \*said William Metcalfe and Timothy Hudson the joint executors of her will.

By a codicil to her will, dated the 22d of April, 1712, reciting that by her will the testatrix had ordered her trustees to pay to the schoolmaster of Nun Monckton, for the time being, out of the rents and profits of the premises, the sum of 5*l.* at the days and times therein mentioned, the first payment to commence as soon as a fit school was set out and appointed by the parishioners of the said parish, she declared her will and mind to be, that her trustees, in lieu of the said annuity of 5*l.*, should fit out and appoint her messuage-house or tenement, with the orchard and croft thereunto adjoining, at Nun Monckton, for a conve-

nient school-house and habitation for the master or masters of the said school forever, and should also appropriate and pay to the said master and masters of the school forever, the rents and profits of the close there commonly called or known by the name of the Three Acre Close, for the maintenance and support of the said master and masters successively forever, at their own costs and charges, keeping and maintaining the said messuage in good and sufficient repair; and whereas she had by her will ordered her trustees to purchase lands of inheritance, of the annual value of 66*l.* for the charities therein particularly mentioned, and whereas since the making of her will she had actually purchased at Skipwith, in the county of York, lands of inheritance of that value and upwards, she therefore revoked the said order; and in lieu of the 66*l.* per annum so to be purchased by her trustees, she thereby gave and bequeathed unto her trustees all her freehold lands, tenements and hereditaments at Skipwith aforesaid, with their appurtenances, to hold to her trustees, and their heirs forever, to the intent that her said trustees should annually, out of the profits \*thereof, and of the residue of [\*367] her estate devised to them, pay to the ten poor women successively forever, and in like manner to the three poor blind men or women, as in her will was ordered and directed; and to the schoolmaster in her house at Foss Bridge-end, 20*l.* annually, for the service in her will also mentioned; provided always, that the rents, issues and profits of the ten cattle gates in Skipwith Holmes, being of the value of 5*l.*, or thereabouts, should be annually paid as the same became due, from the time that the parishioners of Skipwith aforesaid, should provide a school-house in the said town, to such schoolmaster as should be resident there, forever, for the teaching of ten boys gratis, such as her trustees, or the major part of them, should elect and nominate; and for want of a school-house, to be appropriated by the said parishioners, that the rents and profits of the said ten cattle gates should, in the meantime, be employed and expended in building or purchasing of a fit house for that purpose; provided also, that the rents, issues and profits of the two closes in Skipwith aforesaid, containing seven acres, and of the several other pieces of land therein described, should forever be expended and laid out in the necessary and convenient repairs as well of her charity house at Foss Bridge-end, in York, as of the said school-house in Skipwith. And the codicil further contained several pecuniary legacies and other charitable bequests to be paid out of the rents and profits of the devised lands. Another executor was also appointed in the room of William Metcalfe, deceased; and the testatrix thereby desired and requested the Lord Archbishop of York, for the time being, and the Dean of York, for the time being, forever to supervise and inspect the accounts of her trus-

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tees, and to regulate and see the trusts annually performed, as well as to the erection of the new school-house and [368] charity houses, and the repairs thereof, as to \*the performance of the charities by her given in all other respects. Also her will and mind was, that, notwithstanding anything in her will mentioned, she gave and bequeathed the rents, issues and profits of all her lands and tenements to her executors for the first half year after her decease, to be equally divided between them, to the intent that they might more cheerfully take upon them the burden and execution of her will and codicil, and of all the matters and things therein mentioned; and to the same intent she gave and devised unto her executors all the rest and residue of her personal estate whatsoever, not thereby, or in her will formerly by her disposed of, her debts, legacies and funeral expenses being first paid and discharged.

By a second codicil, she confirmed her will and former codicil, with the exception of a few immaterial alterations.

By a third codicil, dated the 11th of June, 1716, reciting that, since the making of her will and former codicils, she had purchased a close called the Moor Close, situate in Nun Monckton, in the county of York, she therefore thereby gave and devised the said close in Nun Monckton unto the surviving trustees in her will and codicils named, and to another trustee therein named, and the survivors, &c., in trust that they and the survivors, &c., should, from time to time, forever thereafter pay the clear annual rents and profits of the same close as the same should be received, to the master or masters, for the time being, of the school at Nun Monckton, in her will and codicils mentioned, as a further augmentation of the stipend or salary of the schoolmaster there. And whereas by her will and codicil, she had given

to Jonathan Cade and his wife, and to the three sons of [369] Jonathan Cade, the several legacies therein \*mentioned, amounting in all to the sum of 13*l.*, she thereby revoked the said legacies, and gave and bequeathed the sum of 13*l.* to her trustees, to be by them and the survivors, &c., placed out at interest or laid out in a purchase of land, and the interest and increase thereof to be applied and laid out in bibles, to be given to each scholar at his or her departure from the said school at Nun Monckton.

The estates which passed by the will and codicils of the testatrix, had greatly increased in value, and a very large accumulation, amounting to upwards of 10,000*l.*, had arisen from the increased rents. The present information was filed by the trustees of the charities, for the purpose of having it declared, that the whole rents and profits of the charity estates, and the accumulations, ought to be applied to the improvement or augmentation of the several charitable foundations; and the heir at law of the

testatrix was made a party defendant, for the purpose of having it determined, whether he was entitled to the surplus rents and profits as a resulting trust.

Sir *C. Wetherell* and Mr. *O. Anderdon*, for the relators, contended that, from the whole frame of the will and codicils, it manifestly appeared to have been the intention of the testatrix, to devote the whole of the devised estates to charitable purposes. The testatrix, at the date of her will, not being seised of sufficient real estate, to answer all the charitable purposes of her will, directed her executors, to whom she gave the residue of her personal estate, to lay out so much of her personal estate as would be necessary to purchase lands of inheritance of the value of 66*l.* per annum, the rents and profits of which were to be applied by her trustees to the same charitable purposes as the rents and profits of \*her real estates devised by the [\*370] will. It afterwards became unnecessary that that purchase should be made by the executors, inasmuch as the testatrix purchased other lands, of more than the value of 66*l.* a year; and it was to be observed that, in the codicil in which the testatrix stated that fact, she provided for the surplus beyond 66*l.* by an increase of the purposes and objects of her charity. One of the strongest circumstances indicating the intention of the testatrix, to devote the whole of her real property to charity, and amounting to an exclusion of an intention that any part of her property should go by way of resulting trust to the heir, was, that even the small sums of 6*l.* and 5*l.* given out of the rents and profits to Elizabeth Smith and Eliza Wilson respectively, were after the deaths of the legatees, directed to be applied to the charitable purposes of her will. The provisions made for repairs, the expense attending which was of an indefinite nature, also went to show that the testatrix did not intend that the heir should have any interest in the surplus. The authorities were clear upon the principle, that where it was plainly the intention of the testator to devote his estates to charity, the increased rents went to the charity by enlargement of the original trust, and did not result to the heir; *Attorney-General v. Tonna*, (a) In the *Attorney-General v. Sparks*, (b) Lord Hardwicke said that, where it was the intention of a testator to give his whole estate to charity, it was but justice that the objects of the charity should have the benefit of the increased rents, as they must have borne the loss had the estates fallen in value.

Mr. *Pemberton* and Mr. *Wright*, *contra*.—The question is not whether any intention to benefit the heir is to be found upon

(a) 2 Ves. jun. 1; 4 Bro. C. C. 103.

(b) Ambl. 201.

[\*371] the face of these \*instruments, but whether there is a clear unequivocal intention on the part of the testatrix, to devote the whole of her real estate to charitable purposes, in exclusion of the heir. Upon the will, undoubtedly, the heir could take nothing by way of resulting trust; but the first codicil created totally different trusts from those declared by the will, and provided different funds for the satisfaction of them. By the will she directed lands to be purchased of the value of 66*l.* a year; by the codicil it appears that she herself purchased lands at Skipwith of greater value than 66*l.* a year. Supposing that she had provided a sufficient fund for the satisfaction of her charitable trusts by the will, by the codicil it appears that she had a fund more than sufficient. The whole amount of the rents of her real estates at the date of the will and codicil cannot be ascertained. The sums directed to be paid out of the rents and profits by the will amount to 137*l.* 10*s.*; the sums in the first codicil amount to 111*l.*, so that there is, *prima facie*, a surplus of 26*l.*, which is undisposed of by the codicil, and which results to the heir. The question is, whether from the will and codicils it can be inferred, with any reasonable certainty, that it was the intention of the testatrix to devote the whole of her property to charitable purposes. It must, no doubt, be admitted to be an established principle of the court, that where a devise of real estates is made to trustees upon trust, to apply certain specified sums out of the rents and profits to charitable purposes, which sums exhaust the whole income at the date of the will, the court attributes to the testator, an intention to devote to charity the whole rents and profits of the estates, not only at the date of the will, but in all future times. But that principle is not applicable to the present case, because the gross amount of the rents and profits, at the date of the will is unascertained; and, moreover, the devise is not made to the trustees for charitable purposes \*generally, but “upon the special trust and confidence hereinafter particularly mentioned and expressed;” and the trusts which follow are not exclusively charitable trusts, but comprise several gifts to individual legatees. It cannot, therefore, be successfully contended, that the testatrix has expressly devoted the whole of her property to charity, or that there is anything on the face of these instruments amounting to an exclusion of the heir.

Sir Charles Wetherell, in reply:—The codicil, instead of diminishing, increased the charitable purposes of the will; it confirmed all the trusts of the will, and introduced other trusts which enlarged the charitable purposes of the testatrix. The devise in the third codicil of the small piece of land called Moor Close, which she had purchased subsequently to the date of the



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prior codicil, and of which she directed the rents to be applied as an additional provision for the schoolmaster at Nun Monckton, showed that she could not have contemplated any surplus which the heir could claim by way of resulting trust.

*February 19th.*—THE MASTER OF THE ROLLS:—Whether the increased rent of an estate devised to a charity, is to be applied to charitable purposes, or results to the heir, depends upon the expressed intention of a testator. If, in direct terms, the whole profits of the estate are devised to charitable uses, the heir is of course excluded from any resulting trust in the increased rent. If the charitable purposes mentioned in the will exhaust the whole actual rent of the estate \*at the time of the devise, the plain implied intention of the testator necessarily excludes the heir. [\*373]

In this case the actual rent of the premises devised at the death of the testatrix is wholly unknown; there are, however, circumstances from which it is rationally to be inferred that the whole actual rent was exhausted by the expressed charitable purposes of the testatrix. At the making of her will the testatrix had not a sufficient estate to meet her charitable intentions, and she desired her executors to purchase out of her personal property an additional estate of the annual value of 66*l.*, and directed such estate to be conveyed to the same persons who were to be trustees of her estates devised to the charitable uses of her will, and upon the same special trust and confidence; and she gave the residue of her personal estate to her executors. It is to be intended that this increase of the precise sum of 66*l.* a year was considered by her as necessary to supply her charitable purposes, and it is not probable that she would withdraw from her executors, who were the objects of her bounty, more of her personal estate than was required for that purpose, in favor of her heir, who is never noticed in her will. Between the execution of her will and the making of the first codicil, she had purchased a further estate; and stating it in the codicil to be of greater annual value than 66*l.*, she, by her codicil, makes additional charitable bequests. After the first codicil, and before the second, she purchases another estate, called Moor Close, and by this codicil she gives the rent of Moor Close by way of further salary to the master of the school at Nun Monckton, which she had founded by her will and first codicil. These two codicils confirm the inference drawn from the will. If her prior charities had not exhausted all the profits of the estates devised by the will and first codicil, she would not have waited until she had acquired \*a further estate to supply that additional salary [\*374] to the schoolmaster, which she considered necessary for the due support of the school.

My present opinion is, that there is no resulting trust for the heir; but if, upon a more minute examination of the instrument I should alter my opinion in that respect, I will make a declaration accordingly.

*March 4th.*—His Honor afterwards made the following observations:—In this case I continue to be of opinion, that it was not the intention of the testatrix to create a resulting trust for the benefit of the heir. The testatrix, by her will directs her executors, to whom the residue of her personal estate is given, to purchase out of her personal estate lands of the annual value of 66*l.*, which were to be conveyed to her trustees upon the charitable trusts mentioned in the will. This direction excludes the supposition that she contemplated any surplus of her real estate for the benefit of the heir. By her first codicil she revokes the direction for the purchase of other lands, stating that she had herself purchased land situate in Skipwith, exceeding the annual value of 66*l.* This would afford an inference that there was a resulting trust for the heir, if the charitable purposes of the testatrix had remained exactly the same as that expressed in the will; but no such inference can arise, because, in the same codicil, she introduces other charitable trusts in addition to those declared by the will.

The second codicil makes no material difference in [\*375] the dispositions made by the will and prior codicil; \*but in the third codicil she recites that, since the making of her will and codicils, she had purchased a close called Moor Close, which she devises to her trustees for the purpose of providing, out of the rents and profits, an additional income for the master of the school which she had founded at Nun Monckton. If the testatrix had not supposed that the charitable purposes for which she had provided had exhausted the rents and profits of the devised estates, a supposition inconsistent with the intention of creating a resulting trust for the heir, she would not have purchased another piece of land for the purpose of giving an additional benefit to the schoolmaster at Nun Monckton.

Upon the will and codicils taken together, I am clearly of opinion, that it was the intention of the testatrix that there should be no resulting trust for the heir, but that she meant to devote the whole of her real estates to charitable purposes.

My decree, therefore, is, that the increased rents are applicable to charitable purposes, and a reference must accordingly be made to the Master to approve of a proper scheme for the application of the increased rents.

1834.—*Hoffman v. Hankey.*\**HOFFMAN v. HANKEY.*

[\*376]

ROLLS.—1834: 4th March.

A testator made a bequest in the following words:—"I give to my executors the sum of 1,000*l.* upon trust, to be invested in the funds of the Bank of England during the lives of the survivors or survivor, for the widows of J. S. and T. D., to be divided between them, share and share alike." The testator appointed two executors of his will. One of the widows died in the testator's lifetime; the other widow survived the testator, and received the interest of the 1,000*l.* during her life. Held, upon the death of the surviving widow, that the bequest was void for uncertainty, and belonged therefore to the residuary legatee.

THE will of the testator in the cause contained the following bequest:—"I give to my executors the sum of 1,000*l.* upon trust to be invested in the funds of the Bank of England, during the lives of the survivors or survivor, for the widows of John Sayce and Thomas Draper, to be divided between them share and share alike." The testator appointed two executors of his will. The widow of Thomas Draper died in the lifetime of the testator, and the other widow survived the testator, and received the interest of the 1,000*l.* during her life. The question was whether upon her death the 1,000*l.*, or any and what part of that sum, belonged to her representative, or whether it was undisposed of, and consequently belonged to the residuary legatee.

Mr. *Bickersteth* for the residuary legatee:—"The word "survivors" cannot be referred to the lives of two persons; for upon the death of one there will be only a single survivor; consequently, the words "during the lives of the survivors or survivor" cannot be applied to the widows. For the same reason the executors, of whom there are only two, cannot be entitled under those words, even if they had not been excluded by the words, "in trust." The clause, therefore, not being capable of a construction which will give the legacy to any persons named in it, must be considered as void, and the bequest will fall into the residue.

\*Mr. *Barber*, for the executors.

[\*377]

Mr. *Tinney*, for the representative of the surviving widow:—"It is clear that the testator could not have intended the executors to take beneficially, for he gives the legacy to them expressly upon trust. It appears to have been the intention of this testator, however inaccurately that intention may be expressed, to give the legacy in equal moieties to the two widows; and as the words pointing to survivorship are more obviously to be referred to the antecedent persons, namely, the executors, than to the widows, it follows, that the interest intended to be given to the widows, was an absolute one. Putting that construction

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upon the bequest, there will be a lapse as to one moiety, and the other moiety which vested in the surviving widow will belong to her representative.

THE MASTER OF THE ROLLS:—It is impossible to put any rational construction upon this bequest. It must, therefore, be considered as void for uncertainty; and the 1,000*l.* will consequently form a part of the residue.

[\*378]

\*DOUGLAS v. COOPER.

ROLLS.—1834: 24th May.

Where in a marriage settlement a power of appointment by will, signed, sealed, published and declared in the presence of two witnesses, is given to the wife, notwithstanding her coverture, and an instrument afterwards executed by the wife is proved as a will, this court is concluded by the decision of the Ecclesiastical Court that the instrument propounded is a will, and is bound to consider it as a valid execution of the power, if the instrument be proved in this court to have been executed with the formalities prescribed by the power.(a)

THIS was a bill filed by the personal representatives of Charles Williams, deceased, for the purpose of having a sum of 25*l.* a year in the long annuities transferred to them, according to the trusts of the marriage settlement of Mr. and Mrs. Williams. Under that settlement, which was executed in February, 1800, immediately before the marriage, the stock in question, which was the property of the intended wife, was vested in trustees, upon trust for the separate use of the wife for life, with remainder, as she should by deed or writing, by her signed, sealed and delivered, in the presence of, and attested by two credible witnesses, or by her last will and testament in writing, or any codicil thereto, to be by her signed, sealed, published and declared in the presence of the like number of such witnesses, limit and appoint; and in default of such appointment, upon trust for the children of the marriage, with remainder in default of appointment, and on failure of such children, in trust for the intended husband, his executors, administrators and assigns.

The marriage took effect, but the parties separated in the month of July, in the same year, 1800. Mr. Williams, the husband, died in the month of December following, leaving no issue of the marriage. In the year 1809, his wife intermarried with a person of the name of Whitchurch, and from that time

(a) That the granting to probate is conclusive as to the testamentary character of the instrument in reference to personalty, see *Colton v. Ross*, 2 Paige Ch. R. 396; *Van Rensselaer v. Morris*, 1 Paige Ch. R. 13; *Monell v. Dickinson*, 1 John. Ch. R. 153; *Darrington v. Borland*, 3 Port. R. 11; *Russell v. Dickson*, 1 Con. & Law, 284. But not in respect to real estate, see *Tompkins v. Tompkins*, 1 Stor. C. C. R. 547.

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till her death, which happened in the year 1816, continued under coverture. Upon the death of Mrs. Whitchurch, who had no issue by either marriage, Mr. Milward, one of the trustees of the marriage settlement, retained and appropriated to his own use the dividends of the stock, and continued \*to [\*379] do so until the year 1830, when he died, leaving the defendants Howard and Twyford, his executors, and the defendant Cooper, his co-trustee, surviving him.

After the death of Milward, a claim was made to the long annuities on the part of the defendants, Mr. and Mrs. Greenway, who produced to the surviving trustee, an instrument in the testamentary form, and purporting to be an appointment by will, executed by Mrs. Williams, in the month of October, 1800, after the separation, but during her first husband's lifetime, and disposing of the long annuities to Mr. Milward, the trustee, for life, with remainder to Mrs. Greenway absolutely.

The personal representatives of the first husband disputed the validity of this appointment, and filed the present bill in the year 1832, asserting their title to the stock. Shortly after the filing of the bill, a suit was instituted in the Ecclesiastical Court by Mr. and Mrs. Greenway, to have the instrument of appointment admitted to probate as a will; and on the 21st of February, 1833, Sir John Nicholl made a decree, allowing the instrument to be proved, and granting a limited administration to Mr. and Mrs. Greenway. Upon a subsequent application, made on the 19th of April, 1834, at the instance of the personal representatives of Mr. Williams, to have this administration recalled, the question with respect to the validity of the instrument as a will, was fully argued and considered; and Sir J. Nicholl adhered to his former opinion.

Mr. *Pemberton* and Mr. *Ching*, for the plaintiffs:—The learned judge in the Ecclesiastical Court, who granted administration with the will annexed to Mr. and Mrs. Greenway, did not make his decree without feeling \*and expressing [\*380] very great difficulty on the question. He considered the case to be a novel and extremely doubtful one, there being no authority directly in point; and he appeared to rest his decision mainly on the fact, that the second husband could take no benefit in the settled property, and had no interest to dispute the will made by his wife during her former coverture. The conclusion to which Sir J. Nicholl finally came, however, by which he recognized the appointment as a valid will, seems equally opposed to principle and authority. The power was reserved to Mrs. Williams for the sole purpose of protecting her against the rights of her husband, in the event of his being the survivor;

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*Horseman v. Abbey*.(a) There is, therefore, strong ground for contending, that as Mr. Williams died before his wife, the power given to her by the marriage settlement, as well as any appointment she might have made under it, became, when she survived him, wholly inoperative.(b)

Independently of that argument, however, all the cases concur in holding that marriage operates as a revocation of a will made by a woman while she is a *feme sole*, and renders it an absolute nullity; *Force & Hembling's case*;(c) so much so, that it will not be set up as a valid instrument, by reason of her having afterwards become discover, and having allowed it to remain in her possession uncanceled till her death; *Mrs. Lewis' case*.(d) So in *Hodsdon v. Lloyd*;(e) where a power had been reserved to the wife by marriage articles to dispose of her property by will after marriage, a will made by the lady subsequently to the [381] articles, but a few hours before \*the marriage, was held to be revoked by the marriage. It is impossible to consider this testatrix as placed in a more favorable situation by the effect of the power reserved in the marriage settlement, than she would have been in as a *feme sole*; and from the authorities cited, it is clear that, if the instrument in question had been executed after her first husband's death, and at a time when she was a *feme sole*, her subsequent marriage to Mr. Whitchurch must *ipso facto* have revoked it. Undoubtedly, where a power of appointment over personal estate by will is given to a married woman, the instrument must be proved in the Ecclesiastical Court as a will; *Cotter v. Lyster*;(g) *Stone v. Forsyth*;(h) but *Rich v. Cockell*;(i) shows that the court requires not only that the seal of the Ecclesiastical Court be affixed to it as a will, but also some proof that it is a proper execution of the power. Assuming it to be a valid testamentary instrument, and also to be duly executed, it is still open to this court to give it what effect it may think fit.

The MASTER OF THE ROLLS said, that assuming the question to be properly cognizable in this court, his doubt would be whether the second marriage did not revoke the will. He should have been disposed to think that it did; and upon this principle, that, as the power reserved by the settlement to the wife to make a will during the coverture was given simply to protect her

(a) 1 Jac. & Walk. 381.

(b) See, however, *Morvan v. Thompson*, 3 Hag. 239; *Stevens v. Bagwell*, 15 Ves. 139; and *Dingwell v. Askew*, 1 Cox, 427.

(c) 4 Rep. 60 b.

(d) 4 Burn E. L. 51.

(e) 2 Bro. C. C. 534, and at law, nom.; *Doe v. Staple*, 2 T. R. 684.

(g) 2 P. Wms. 623.

(h) Doug. 707.

(i) 9 Ves. 369.

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against the first husband, she was to be considered, during her first husband's lifetime, as a *feme sole*; and supposing this will to have been made at a time when the testatrix was a *feme sole*, her second marriage would clearly amount to a revocation. These, however, were considerations into which he had no right to enter. The instrument here must now be taken to be a valid testamentary \*paper, and the only office of this court [\*382] was to see that it had been duly executed and attested according to the power.

Mr. *Pemberton* then said, that such being his Honor's opinion, he should not attempt to carry the argument further. The attestation and execution of the will, he admitted, were sufficiently proved by the depositions.

Mr. *Bickersteth*, Mr. *Tinney*, Mr. *Lovat*, Mr. *Garratt* and Mr. *Bethel*, for the different defendants, submitted that the bill ought to be dismissed with costs.

THE MASTER OF THE ROLLS:—The power given to the wife is to appoint by a will signed, sealed, published and declared in the presence of two credible witnesses. The Ecclesiastical Court having determined that the instrument set up by Mrs. Greenway is a will, this court is, by that decision, precluded(a) from questioning it as a will, and is bound to consider it as a valid appointment, if it appear to have been executed with the formalities prescribed by the power. These circumstances being sufficiently proved by the evidence in the cause, the bill ought to be dismissed; but considering that the instrument had not been established to be a will at the time when this suit was instituted, although Mrs. Whitchurch had then been dead sixteen years, and that the plaintiffs upon her death acquired a *prima facie* title; and, considering also the novelty of the case, and the doubt expressed by the learned judge in the Ecclesiastical Court, I think it only reasonable that the costs of the suit should come out of the fund, at the same time making a declaration, that the defendant Mrs. Greenway is entitled to the stock.

(a) *Griffiths v. Hamilton*, 12 Ves. 307.

\**FOURDRIN v. GOWDEY.*

[\*383]

ROLLS.—1834: 13th March, 29th April and 1st May.

An alien resident in England, purchased an equitable interest in freehold lands, and also a lease for a long term of years, and afterwards obtained letters of denization, which, in terms, conferred upon him the power not only of acquiring lands in fu-

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ture, but of retaining and enjoying all lands which he had theretofore acquired: Held, that he had power to devise the freehold and chattel interest in land which he had purchased previously to the letters of denization.

By his will he directed all his property to be sold and converted into money, and after charging this mixed fund with his debts and legacies, gave the residue to aliens resident abroad, one of whom was his heir at law: Held, that the rule which is applicable to charitable bequests was applicable in such a case; that the interest in land and the pure personal estate must respectively be valued, and bear their proportions of the debts and legacies; and that the residue of the interest in land belonged to the crown, and the residue of the pure personal estate to the aliens.

A testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of 100*l.* to J., and another of 100*l.* to M., who was a married woman, to her separate use, independent of her husband; and it was left to his discretion either to pay the charges in his lifetime or to direct them to be paid by his executors. He did not pay them in his lifetime; but amongst other legacies which by his will he directed his executors to pay, was a sum of 500*l.* to J., and a sum of 100*l.* to M., not limited to her separate use: Held, that the sum of 100*l.* given to J. by the appointment of the wife, was satisfied by the 500*l.* bequeathed by the testator; and that the sum of 100*l.* bequeathed to M. was in addition to, and not as satisfaction of, the 100*l.* given to her separate use by the wife.

In the month of August, 1821, Francis Fourdrin, who was then an alien resident in England, purchased, in the names of trustees, a freehold house in Wardour street, the price of which he paid out of his own moneys.

On the 20th of May, 1822, letters of denization under the privy seal were passed in the usual form, whereby his Majesty George the Fourth granted unto the said Francis Fourdrin, therein described as formerly of Mastaigue, in the kingdom of France, but then of Wardour street, in the county of Middlesex, and unto the six other persons therein mentioned and described, aliens born, that they and each of them should and might be free denizens and liege subjects of his Majesty, his heirs and successors; and that their and each of their heirs respectively should

and might be liege subjects; and that as well they as the [\*384] \*heirs of each of them respectively, might in all things be treated, reputed, held and governed as liege subjects born within the United Kingdom of Great Britain and Ireland; and that they and each of them, and the heirs of each of them respectively, might, in and by all things have, exercise, use and enjoy all and all manner of actions, suits and complaints of what nature or kind soever in all the courts, places and jurisdictions whatsoever within the said United Kingdom, or elsewhere, within his Majesty's dominions, and in them to plead and be impleaded, answer and be answered, defend and be defended as any liege subjects born or to be born in the said United Kingdom might or could; and moreover that the said Francis Fourdrin, and the other persons therein named, and their heirs respectively, might lawfully, and with impunity, at their pleasure acquire, receive, take, have, hold, purchase and possess lands, tenements, rents, revenues and services, and all other hereditaments whatso-



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ever within the said United Kingdom, and other his Majesty's dominions; and might use and enjoy the same to them and their heirs forever, or in any other manner whatsoever; and might give, sell, alienate and bequeath the same to any person or persons as they should think fit, and as fully, freely, quietly, entirely, and peaceably as any liege subjects born within the said United Kingdom might or could; and that they and each of them and their heirs respectively, might freely and lawfully claim, retain, and enjoy manors, lands, tenements, rents and hereditaments theretofore given, granted or assigned to them, or any of them, by his Majesty, or by any other person or persons whatsoever, as fully, quietly, entirely and peaceably as any liege subjects born within the United Kingdom might or could; and that they and each of them, and their heirs respectively might have and possess all and all manner of \*liberties, franchises [\*385] and privileges of the said United Kingdom, and other his Majesty's dominions, and use and enjoy the same freely, quietly and peaceably, as liege subjects born within the said United Kingdom, without any disturbance, molestation, hindrance, vexation, claim, or grievance whatsoever, of his Majesty, his heirs, or successors, or of any other ministers or officers, or any others whatsoever.

On the 25th and 26th of May, 1822, the trustees conveyed to Francis Fourdrin in fee the freehold house in Wardour street, which he had purchased in their names.

On the 10th of June, 1810, nearly twelve years prior to the letters of denization, Francis Fourdrin had purchased premises at Paddington, held on a lease for a long term of years; and on the 8th of March, 1817, he assigned this lease in trust, by way of settlement on his wife, who was an English woman, with power to her, notwithstanding her coverture, to dispose of the lease by her last will and testament.

On the 23d of June, 1824, Mrs. Fourdrin made her will, duly executed in pursuance of her power, and thereby gave the lease of the premises at Paddington after her death to her husband Francis Fourdrin, his executors, administrators and assigns, charged with certain sums for the benefit of the legatees therein mentioned.

Mrs. Fourdrin died in the month of July, 1827, in the lifetime of her husband, who, after her death made his will, bearing date the 4th of June, 1828, and duly attested to pass freehold estates by devise. By his will, the testator gave and bequeathed all his freehold, copyhold and leasehold property, and all his \*household goods and furniture, plate, wines, linen, and [\*386] every other property of whatever denomination, to be sold by his executors as soon as conveniently might be after his decease, and disposed of as he should thereafter direct; and he

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enjoined and requested his heir at law to concur with his executors in the sale of his freehold and copyhold estates; and as to all other his personal estate whatsoever, he directed his executors to pay thereout a number of pecuniary legacies which he specified. Lastly, he bequeathed all the residue of his property, after payment of his debts and funeral and testamentary expenses, equally among such of his three brothers and sister, described as then residing in France or elsewhere, as might be living at his decease; and he appointed the defendants, Gowdey, Duff and Toppin, his executors.

The testator died soon after the execution of his will, leaving, besides the freehold messuage in Wardour street and the leasehold premises at Paddington, other leasehold property which he had purchased subsequently to the date of the letters of denization. Two of the testator's three brothers died before him. The surviving brother, who was his heir at law, afterwards died before the institution of the suit; and the sister having obtained administration to the estate of that brother, filed the present bill to have the trusts of the will carried into effect.

At the hearing of the cause, the usual inquiries and accounts were directed; and the Master's report having (among other things) found that the surviving brother and sister of the testator were aliens, residing in a foreign country, the cause now came on for further directions.

[\*387] \*In the course of the discussion several questions were raised, of which the most important were, whether under the circumstances stated, the testator had, by the letters of denization, acquired the power to dispose of the freehold house in Wardour street, and the leasehold premises at Paddington by his will; whether the general conversion which the testator's will directed to be made by his executors, could be carried into effect for the benefit of his alien brother and sister; and how, in the event of such conversion failing to any extent, the charges on the several descriptions of property were to be apportioned, with reference to the admitted right of his residuary legatees to the surplus of the purely personal estate.

Mr. *Béames* and Mr. *Rogers*, for the plaintiff:—The first question is with respect to the testator's freehold messuage in Wardour street. The conveyance of that messuage was made to two persons who, on the face of the instrument, appeared to be the absolute owners, although, as the whole of the purchase money was paid by the testator, they were in reality trustees for him. The testator was an alien friend, and the older authorities show that an alien friend is capable of taking and holding property, and dealing with it as his own. It is his to all intents, until, upon office found, a title becomes vested in the crown. So it

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was resolved in *Page's case*,<sup>(a)</sup> where it is stated that there are two manner of offices, one "of entitling," that is, giving title to the crown, and the other "of instruction," which pre-supposes the existence of title in the crown, and only serves to distinguish and specify the particular property over which the crown's title extends. This doctrine was under the direct consideration of the court \*in *Attorney-General v. Weedon*.<sup>(b)</sup> In [\*388] that case a legacy had been left to a Frenchman, an alien enemy, but who, in consequence of peace being proclaimed between France and England, ceased to be such enemy before the inquisition was returned; and the court resolved "that the inquisition taken afterwards did not relate to set up this forfeiture; for the cause was but temporary, and that cause being removed before the king's title was found, the forfeiture should not relate." Lord Coke also considers the *status* of an alien, with reference to any lands he may have previously acquired, to be materially improved by a grant of letters of denization.<sup>(c)</sup> In an anonymous case in *Goldsborough*,<sup>(d)</sup> where an alien purchased land in tail, with remainder to a stranger in fee, and the alien suffered a recovery to his own use, and then office was found, the question was as to the effect of this recovery on the remainder. The court there said that "the office hath relation for the possession of the alien, but it hath no such relation to say that the alien never had the property;" and the alien was held to have sufficient estate in him to enable him effectually to destroy the remainder. In another anonymous case in the same book,<sup>(e)</sup> and referred to as authority by Mr. Cruise,<sup>(g)</sup> an alien purchased lands, and before office found, the queen by letters patent made him a denizen; and the question put to the court and much discussed was, as to the effect of the denization upon the previously purchased lands; and on that occasion a majority of the judges concurred with Chief Justice Anderson, who expressed a clear opinion that the lands were not in the queen before office, and, therefore, the confirmation was good; considering, apparently, that the letters of denization, \*coming before [\*389] office, operated to confirm the alien's imperfect title. That principle is directly applicable to the case now before the court. Besides, in the present case, so long as the testator was an alien the property remained in the trustees, he having no more than a trust interest; and it appears from Rolle's Abridgment,<sup>(h)</sup> that "if an alien purchase in fee in the name of J. S., in trust for him and his heirs, though it be found that the land

(a) 5 Rep. 52 b.

(b) Parker, 267. And see *Attorney-General v. Duplessis*, Ibid. 144.

(c) Co. Litt. 2 b, 278 b.

(g) Dig. tit. 32, ch. 2, sec. 38.

(d) 102, pl. 7.

(h) 1 Roll. Ab. 194; 1 Bac. Ab. 81.

(e) Golda. 29, pl. 4; 1 Leon. 47, pl. 61.

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was in trust for the alien, and that J. S. had the legal estate, yet the king must sue in Chancery to have the trust executed for his benefit." The result is, that until office found, the testator had clearly capacity to take and hold the lands in question, and, such being the state of the property, the letters of denization supervened, and rendered his title indefeasible.

These letters are in point of form of the most general and comprehensive kind, referring in terms as well to lands previously acquired as to lands thereafter to be purchased, and it is impossible upon any reasonable construction to restrict their application to the latter. They must operate, therefore, either as a grant and release to the testator of any inchoate rights which the crown might have had in his previous purchases, or, what C. J. Anderson seems rather to have thought, as a confirmation of his theretofore imperfect title. In either view, the testator's title became for all purposes perfect, both as to his freeholds and leaseholds, and these were of course disposable, and were effectually disposed of by his will, in the same way as his subsequently acquired property, as to which there is no dispute. These letters of denization are in the usual form in which such letters have been usually granted; *Fish v. Klein*.(a) The form is in fact

[\*390] the same as \*has been in use from the reign of Queen Elizabeth downwards; and it has never till this time been supposed that in inserting a general clause, applying equally to past and future purchases, the crown was exceeding its powers or contravening either the common law of the land or any positive statute. Of the legality of such a grant there can be no doubt; for, except in so far as he is restrained by express enactment, the king may, by virtue of his prerogative, confer on an alien all the rights which belong to his natural born subjects. The 32 H. VIII, c. 16, in qualifying as to certain points, the power of the crown, with reference to aliens, in effect recognizes and confirms the prerogative in every particular which is not made the subject of a restrictive provision; for the seventh section contains an express declaration, that in all letters of denization granted to aliens shall be inserted a proviso, that such denizens shall be obedient to the laws; except it shall be the king's pleasure to grant such aliens any special liberties or privileges more or otherwise than are allowed by the statutes, in which case all such liberties and privileges must be plainly and specially expressed in the letters patent. And the same observation applies to the 47 G. III, st. 2, c. 24.

If there is any difference between the leasehold and freehold property, it is only this, that the right of an alien friend to acquire and to hold leaseholds to his own use, appears in several

(a) 2 Mer. 431.

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cases to have been recognized, without regard to the qualification sometimes superadded, that the leaseholds shall be necessary for the purpose of habitation, and carrying on his business; *Caroon's case*; (a) *Anon.* (b) With respect to the leasehold \*premises at Paddington, as they came to the testator under the appointment of his wife, subsequently to the date of the letters, the question does not arise, any more than with respect to the other leaseholds which he purchased after denization. [\*391]

The interest taken by the residuary legatees, being given to them as an interest in money and not in land, is not open to the objection founded on the circumstance of their being aliens. The lands are directed to be sold by the executors; an absolute conversion out and out is to be made, and the surplus of the produce, after paying the debts and pecuniary legacies, is to be divided in the shape of personal estate between the sister and the next of kin of the brother who survived the testator.

Mr. *Blunt* for the next of kin of the brother who survived the testator.

Mr. *Bickersteth* and Mr. *Ching* for the trustees and executors.

Mr. *Wray* for the crown:—Although the crown is not entitled to the possession of lands purchased by an alien, unless upon office found, the alien only holds them, in the meantime, for the benefit of the king, being seised until office to the use of the crown; and, upon the death of the alien, the crown is in the constant habit of seising them before office. (c) And this is the doctrine of all the text writers, none of whom have ever conceived that a grant of letters of denization could have any retrospective operation: \**Calvin's case.* (d) The statute of Hen. VIII. (e) contains nothing which extends the powers of the crown in relieving aliens from disabilities, except in the particular points specified; that statute being, in fact, not a restricting, but an enabling statute, and, therefore, to be construed strictly. The circumstance that, prior to the denization, the legal estate of the messuage in Wardour street remained vested in trustees, furnishes no solid ground of distinction; since, if they were trustees, the crown was entitled to the benefit of the trust. So far as the right was concerned, the trust would depend upon the legal principle; the mode in which the title of

(a) Cro. Car. 8.

(b) Bendl. 10, And. 24, Dyer, 2, b. pl. 8.

(c) Co. Litt. 2 b.

(d) 7 Rep. 25; Blackst. Comm. Vol. I, pp. 372-374.

(e) 32 Hen. VIII, c. 16.

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the crown was to be asserted, would be different, but the result would be precisely the same. The alien would be seised in the one case, and would be entitled to the benefit of the trust in the other, till the crown set up its claim; and the moment that was done, whether by inquisition and office, or by a suit in equity founded upon that proceeding, the right of the crown would attach upon the property, and perfect by relation the inchoate title which the very act of purchase had given to the crown originally. The title of the testator to the messuage in Wardour street was a conveyance by trustees of a trust estate, which, at the time when they conveyed it, belonged to the crown; and, of course, such an instrument could pass nothing to the testator. If letters of denization are construed to operate retrospectively, the necessity of applying to the legislature for acts of Parliament to naturalize foreigners who settle and acquire lands in this country, will, in most cases, be done away with; for the main object of such acts will be much more speedily and cheaply accomplished by a royal grant; a consequence which certainly has [\*393] hitherto not been contemplated, and which might frequently prove dangerous to the state. It may be true, that letters of denization have long run in the form here used; but if the crown, in adopting a clause of so large and comprehensive a description, has exceeded its powers, and such is the conclusion to be drawn from the language of all the text writers and authorities on the subject, no usage or official practice, however long and uniform, can give validity to the grant; and the court will be bound so to construe the clause, that it shall apply prospectively only.

If this argument be sound, the devise, so far as the lands acquired before denization are concerned, is wholly inoperative, the testator having no right to dispose by his will of what was in truth the property of the crown. But even allowing its full effect to the retrospective clause of the letters patent, it is still to be observed, that this will vests no estate in the executors, who take a mere power of sale, the estate itself devolving upon the heir, or, as the heir is here an alien, upon the crown. The testator does not direct a total conversion, but only a conversation for certain purposes; and, as in the case of a devise to a charity, the property which cannot be applied to the purposes indicated, remains, in the result, undisposed of. Indeed, the conversion for the payment of debts and pecuniary legacies, is so blended with that in favor of the residuary legatees, who are incapable of benefiting by it, that the devise must fail altogether, and the crown will be entitled to the whole.

In whatever light these questions are considered, the leasehold must stand on the same footing as the freehold interests. The leasehold premises at Paddington, though they reverted to

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the testator under his wife's appointment, were in fact so appointed by virtue of a power \*created by himself [\*394] before he became a denizen, and his title to them, therefore, cannot be stronger than his title to the others. It is clear from the language of Lord Coke that, with the single exception of a house for habitation, an alien can hold no interest in chattels real.(a) The case cited from Bendloe is not law.

Mr. *Beames* in reply.

THE MASTER OF THE ROLLS:—The first question is, whether this testator had a power to devise his freehold and leasehold estate. On behalf of the plaintiff, it is insisted that he possessed such a power, inasmuch as the letters of denization, though not granted until after he had acquired the equitable estate in the lands, operated retrospectively. And the real consideration is whether it is competent to the crown, by a grant of letters of denization, to confirm the title of an alien to lands acquired previously to the date of the letters. The case(b) referred to in *Goldsborough* and *Leonard*, although not amounting to a direct decision upon the point, contains at least an expression of the opinion of the judges of that period, and especially of a very learned judge, Chief Justice Anderson, that such letters patent would have the effect of confirming the prior title. If the question is considered on principle, is there any assignable reason why the king, if so minded, should not have the power by letters of denization of confirming a previously acquired title in an alien? The king, in respect of a purchase of lands by an alien, may by a proceeding denominated "an inquisition of entitling," assert his title to those lands; \*and why may [\*395] he not also, if he pleases, confirm the title and waive his right of asserting his own prerogative against that title? There is no conceivable principle on which it can be held that the crown has not that power.

The matter thus standing upon principle, how does it stand upon authority? The statute of 32 H. VIII, c. 16, restrains the power of the crown, with respect to letters of denization in certain particulars. No letters of denization are to be granted, unless the party receiving them shall be obedient to the laws of the realm; and by the seventh section it is enacted that aliens shall be bound by the statutes then made, any letters patent, theretofore made, or thereafter to be made, notwithstanding. But in that very statute, meant to restrain the general authority of the crown, and in the same section, it is added, "except it shall be

(a) Co. Litt. 2 b.

(b) *Anon.*, *Golda* 29, pl. 4; 1 *Leon.* 47, pl. 61; 4 *Leon.* 82, pl. 175.

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the king's most gracious pleasure to grant to any such alien any special liberties or privileges more or otherwise than is contained in those statutes." Then comes the statute 47 G. III, stat. 2, c. 24, which expressly recognizes the power of the crown in this respect. But, although it appears that the form used in these letters of denization, is the one that was adopted in the reign of Queen Elizabeth, and although the same form has been continued ever since, down to the present time, it has, nevertheless, been contended at the Bar, not on the authority of judges or of decided cases, but of the alleged practice of the law officers of the crown, that, during the whole of this period, the crown has inserted in its letters of denization a clause which it had no right to insert, and which must, therefore, be considered as inoperative. Is it upon a vague assertion of this kind, that the court can be justified in acting? No principle has been or [\*396] can be shown in support of the proposition. \*The clause has been uniformly inserted in all letters of denization for centuries. Under such circumstances, I am clearly of opinion that the crown has authority to introduce the clause which is found in these letters, and that its effect and operation are retrospectively to confirm the title which the testator had previously acquired.

It follows as a necessary consequence, that the testator had full power to devise these lands. He has by his will devised them to be sold by his trustees and executors, and, after charging the produce with his debts and legacies, has given the surplus to such of his three brothers and sister as should be living at the time of his death. It happens that only one brother and his sister survived him; and, but for the circumstance to be immediately adverted to, they would of course be entitled to the devised property, consisting of a mixed fund, the produce of real and personal estate, subject to the charges which the testator has imposed on it. The brother and sister are aliens, residing in a foreign country; they are, therefore, incapable of taking a devise of lands.

It was said, indeed, that this is not a devise of lands, for that the testator directs the lands to be sold, and the surplus of the produce to be paid to his residuary legatees; so that it is to be considered as in effect a bequest of money. I concur with the counsel who argued that there is here no devise to the executors, but simply a power given them to sell, followed by an express direction that the heir, upon a sale, shall confirm the title of the purchaser. The heir, therefore, under this will, takes the real estate as a trustee for the purposes of the will, taking it as land, as the testator possessed it, and not as money; and when it has been converted into money, the persons to whom it be- [\*397] longs will \*take it in the shape into which the testa-



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tor desired it to be converted; they will take it as personal estate. In the consideration of law, however, this property was real estate, which descended to the heir, with a mere power of sale to the executors; and the argument wholly fails that this is a bequest of money, and not a devise of land.

It was argued, moreover, that inasmuch as the alien devisees are to take it not as land, but as money, the law which incapacitates aliens to take any benefit in lands would not apply. The testator, however, has given them the funds in question, subject only to the charge imposed on it by his will, namely, payment of his debts and legacies; and aliens can no more take an interest in the land, (which this would be,) than the land itself.

Since then, the brother and sister can take no interest in the land or its produce, the question comes to be, what interest they can take under this bequest and devise. An alien may take beneficially money, or other personal estate not consisting of chattels real; and in order to apportion the burden, the rule to be applied in this case is the rule which is adopted in the case of charities. There is here a mixed fund given for certain specified purposes, and consisting partly of real and partly of personal estate. These estates must bear the charges imposed on them in proportion to their respective values; and with a view to ascertain those values, the Master must inquire and ascertain how much of the general produce of the testator's property has arisen from real estate, and how much from personal estate, including in the former the chattels real, which, with reference to aliens, stand on the same footing as if they had been bequeathed to a charity; for, with the single exception of a leasehold habitation for the purposes of \*trade, an alien can no [\*398] more acquire any interest in leasehold, than in real estate properly so called. The proper course will be for the Master to set a value upon these two portions of the estate respectively, and the legacies and charges must be borne by each in proportion to its value.

I have not hitherto adverted to the case of the chattels real. One of the leasehold interests was purchased subsequently to the date of the letters of denization. As to that, therefore, no question can arise with respect to the testator's right to dispose of it by his will. The other was purchased before he became a denizen, and was settled by him on his wife, with a power for her to dispose of it, notwithstanding her coverture. Afterwards came the letters of denization; and then followed the death of the wife, who, by an appointment in exercise of her power, disposed of the property to her husband. Upon this point, the first consideration is, whether an alien acquiring property can, before office found, confer any right upon another. In the course of the argument, I have already expressed my opinion, that an

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alien can confer no such right; and that as against the crown, therefore, the wife acquired no right to this leasehold estate, although, as against her alien husband, she did acquire an interest. Thus it comes round to the same thing as if the husband had never attempted to depart with any interest in his wife's favor, but the whole had remained throughout vested in himself; and then the question will be, as it was in the case of the freehold, whether the subsequent letters of denization do not amount to a confirmation of his title. For the reasons already given, I am clearly of opinion, that they do amount to such confirmation.

The consequence is, that the testator held these chattel leases as if he had acquired them wholly subsequently to denization, \*and that they must follow the same rule as is to be applied to the freehold estate; they will form a part of the interest arising out of real estate, by which the charge of debts and legacies is to be rateably borne, and will be taken into the account together with that estate in the apportionment which the Master is to make, with a view to the charge of debts and legacies. To the extent to which that interest is exhausted by the charge, the estate will not pass to the crown; and the testator's residuary legatees will only take that share of the fund which, had it been given to a charity, the charity could have claimed.

*April 29th.*—His Honor afterwards said that as the question was one of considerable importance and novelty, he should, if it were desired, allow the Attorney-General an opportunity of being heard in support of the rights of the crown, before the decree was finally drawn up.

*The Attorney-General (Sir John Campbell)* now appeared and argued the case for the crown:—The executors are not competent to dispose of the testator's real estate, or to make a good title to a purchaser. As to a large portion of the property, the title of the testator fails, because it was acquired before he became a denizen; and again, as his heir is an alien, the whole of it, on that ground, must vest in the crown. Though an alien may take by deed, the corruption of blood incapacitates him from taking by descent. Independently of the clause referring to previously acquired lands, it is clear that the testator could have no estate, except for the benefit of the crown, in the lands which he purchased before denization. That proposition is established \*by many authorities. It does not appear what was the language of the letters of denization referred to in the anonymous case in *Goldsborough*; (a) most probably they

(a) *Golds.* 29, pl. 4.

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purported to be retrospective; but the opinion thrown out by some of the judges in that case, that they might operate by way of confirmation, was entirely extra-judicial. In the case of attainder, no estate vests in the crown until office found; but after office, the title of the crown relates back to the time of the attainder.

The first question here is, whether at common law it is competent to the crown by letters of denization to confirm the title of an alien to lands purchased prior to the denization.

The powers of the crown are defined and circumscribed by the law of the land, so that the king cannot grant an estate or even a dignity to descend otherwise than according to the course of the common law. So it was decided in *The Prince's case*(a) as to the Duchy of Cornwall, although the recent decision in the House of Lords with respect to the Devon peerage, where it was held that a dignity might descend to heirs male collateral, may seem to be a violation of the principle. The doctrine with respect to denization, and its effects upon a state of alienage, is laid down very fully in Comyn's Digest.(b) It is there said, that the king may grant lands which come to him by descent or escheat, before office found.(c) So in *Calvin's case*, it is laid down by Lord Coke, that when an alien purchaseth any lands, the king only shall have them; and that an alien may purchase *ad proficuum regis*, but the act of law \*giveth the alien [\*401] nothing;(d) and again, in the same case, "No alien can purchase lands but he loseth them, and *ipso facto* the king is entitled thereunto."(e) In his first Institute also he observes, "If a reversion of land be granted to an alien by deed, and before attornment the alien is made denizen, and then the attornment is made, the king upon office found shall have the land."(f) And it is said by Brooke in his Abridgment, that of land purchased by an alien before he was denizen, none shall inherit it, for the king shall have it.(h) Lord Bacon, in his argument in the case of the *postnati* or Scotland,(i) speaking of a denizen, observes, "To this person the law giveth an ability and capacity, abridged, not in matter but in time; and as there was a time when he was not subject, so the law doth not acknowledge him before that time. For, if he purchase freehold after his denization, he may take it; but if he have purchased any before, he shall not hold it. So if he have children after, they shall inherit; but if he have any before, they shall not inherit. So as he is but privileged a *parte post*, as the schoolmen say, and not a *parte ante*."

(a) 8 Rep. 1.

(b) Titles Grant and Prerogative.

(c) Tit. Grant, G. I.

(d) 7 Rep. 25.

(e) Ibid. 28.

(f) Co. Litt. 310 a.

(h) Bro. Ab. tit. Denizen, pl. 7.

(i) 2 Bac. Works, 519, ed. 1765.

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A distinction has always been taken by text writers between letters of denization, which operate prospectively upon the rights of an alien, and an act of naturalization, which puts him in the situation of a natural born subject from the time of his birth; but the argument of the plaintiff, if acceded to, will go a great way to destroy that distinction. If it should be held that previously purchased lands become the absolute property of the denizen by the effect of the letters, a singular anomaly [\*402] \*may arise with respect to the succession to them. It is perfectly settled, that a son born after his father's denization shall inherit to the exclusion of a son born before.<sup>(a)</sup> Now, suppose an alien purchases lands, and then has a son; that, afterwards, letters of denization containing a retrospective clause are granted to him; and that then he has a second son, and dies intestate, which of the sons is to inherit the previously acquired lands? If the grant is to operate retrospectively for one purpose, so as to vest a complete title in the alien as from the date of the purchase, it would seem strange that it should not so operate for all purposes; and yet that would be contrary to the principles laid down in all the books.

**THE MASTER OF THE ROLLS:—**Denization does not give inheritable blood, and, therefore, the son born before the date of the letters, having in him no inheritable blood, would be excluded from the inheritance by his younger brother.

**The Attorney-General:—**Independently of the statutes referred to in the former argument, and professedly regulating the prerogative of the crown in relieving or favoring aliens, there are various other acts of Parliament which greatly modify and restrain the power of the sovereign in dealing with the rights of the crown, and these acts have, by analogy, a strong bearing upon the question before the court; for they show the extreme jealousy with which the legislature has regarded any attempt on the part of the sovereign to alienate the property of the crown, even in favor of natural born subjects. The 8 H. VI, [\*403] c. 16, \*takes away the right of the crown to grant out lands which have been seized by escheators for the king, till a month after the return of the inquisition; and the 16 H. VI, c. 6, declares that no lands escheated shall be granted by letters patent until the king's title be found by inquisition, otherwise they shall be void. By the third section of the 12 & 13 W. III, c. 2, (the act of settlement,) it is declared that no person born out of England, Scotland, or Ireland, and not of English parents, though naturalized or made a denizen, shall be capable

(a) Co. Litt. 8 a.

of having any grant of lands from the crown, or to any other person in trust for him, and the same provision is re-enacted and confirmed by the 1 G. I, st. 2, c. 4, which provides that no naturalization bill which does not contain such disabling clause shall be received in either House of Parliament. It is also enacted by the 1 Anne, st. 1, c. 7, that, for preserving the land revenues of the crown, no grant shall be made of any manors, lands, &c., belonging to the crown, for a period exceeding three lives, or thirty-one years. By the 39 & 40 G. III, c. 88, s. 12, the provisions of the act of Anne were relaxed so far as to enable his Majesty, by warrant under his sign manual, to direct the execution of any trusts to which lands, being vested in the crown by escheat or forfeiture, were theretofore subject; as also to make grants of such lands for the purpose of restoring them to members of the families to which they had previously belonged, or of rewarding the persons who made discovery of the same; and by the 47 G. III, st. 2, c. 24, the same relaxation was by express enactment extended to the case of lands to which, in consequence of their having been purchased by or for the use of or in trust for aliens, the crown had become entitled. It is argued that until office found the legal estate is not in the crown, and that those statutes, therefore, would not prevent the king from waiving or releasing \*his inchoate right to the lands. [\*404] But the inchoate right might at any time be completed by inquisition, and might certainly in the meantime be the subject of a grant; and are not letters of denization, containing this retrospective clause, in substance a grant of the lands, notwithstanding that the legal title remains, until office, in the alien? Whether the letters operate as the release of an imperfect title belonging to the crown, or as the confirmation of an imperfect title vested in the alien, is immaterial. They amount to a departing by the crown with a right of property, either actual or potential, which had vested in it by virtue of the prerogative; in other words, they are a grant, and they fall directly within the prohibition so anxiously inserted in the various statutes passed since the revolution, for the protection of the royal property and revenues. The 47 G. III, c. 24, expressly provides, that in all cases in which his Majesty shall become entitled to any lands by reason of the same having been "purchased by or for the use or in trust for any alien," (words which exactly apply to this case,) it shall be lawful for his Majesty to make grants of such lands to any person who may make discovery of the same. Nothing is there said of the king's title having been found by office; and it cannot be supposed that if the king had otherwise and of common right the power, without limit or restriction, to grant the lands which, in consequence of having been purchased by or in trust for aliens, had become vested in him by virtue of the preroga-

tive, the law officers of the crown of that day would have required, or the legislature would have passed, any enabling statute for this special purpose.

Upon these grounds it is submitted that his Majesty had not the power to grant letters of denization in this extensive form; and that so far, therefore, as they purport to operate retrospectively, \*or to confirm prior purchases, they must be void. But even assuming that his Majesty possessed the power, is the language of the clause sufficiently stringent and comprehensive to have the operation which is claimed for it? By the 1 H. IV, c. 6, it is enacted, that all petitions for grants by letters patent, as well as the letters patent themselves, shall make express mention of the true value of the things to be granted, otherwise the letters patent shall be wholly void. With respect to a grant by which the crown conveys any interest to a subject, the utmost strictness of construction is always to be observed. In Comyn's Digest,<sup>(a)</sup> it is laid down that general words in the king's grant never extend to a grant of things which belong to the king by virtue of his prerogative; for such ought to be expressly mentioned. Here the language of the clause is quite general and vague, describing no parcels or particular lands as having been previously acquired, or as being comprised in the grant. Besides, the lands in question do not fall within the words of the retrospective clause, which is confined in terms to lands that had been conveyed to the alien, whereas these had not been conveyed to the alien, but to trustees for him.

The *Attorney-General* was proceeding to argue upon the second point, that the heir at law of the testator, being himself an alien, could not be entitled to the real estate or its produce, when his Honor observed that he had already decided that the heir personally could have no claim, although he was disposed to think that to the extent of the charge for payment of debts and legacies the devise might be good.

[\*406] \*The *Attorney-General*:—The authorities are clear that on the death of an alien his lands vest in the crown without office; and if as to the previously acquired lands this testator's condition was not improved by denization, his will could not affect them even for the benefit of his creditors. Where the purchase and conveyance are made directly from the executors the purchaser claims as devisee, and the title of the crown is excluded; but here the executors having only a power and not an estate, the title of a purchaser would not be under the will, but through the heir of the deviser, and that heir being

(a) Tit. Grant, (G. 7.)

an alien, the estate upon the testator's death would, by a paramount title, immediately vest in the crown.

Mr. *Beames*, in reply to the last point taken on behalf of the crown, referred to *Isabel Goodcheap's case*,<sup>(a)</sup> where it was held, that if a man desires that his executors shall sell his lands, and afterwards dies without heirs, so that his lands escheat to the king, the authority given to the executors shall bind the land into whose hands soever it comes. That case, which was cited and approved by C. J. Bridgman in *Bate v. Amherst*,<sup>(b)</sup> and relied upon in *Cholmley's case*,<sup>(c)</sup> was an express authority in point. The power of sale given to the executors by a will, which took effect before office found, divested the imperfect title of the crown, and overrode and prevented the escheat; *First Institute*; <sup>(d)</sup> *Nichols v. Nichols*; <sup>(e)</sup> *Comyn's Digest*.<sup>(g)</sup>

**THE MASTER OF THE ROLLS**:—The first question in this cause is, whether the testator, by the letters of denization referred to, had \*acquired the power of devising the free- [\*407] hold and leasehold premises previously purchased by him. By the express words of those letters, he was not only authorized to acquire lands by future purchase, but to retain and enjoy all lands which he had before purchased.

It is argued that, notwithstanding these express words, the right to retain and enjoy previously acquired lands was not conferred upon him; but no authority is cited to that effect. That the crown had at common law a right to confer that privilege admits of no doubt; the practice of the crown to insert such a clause in letters of denization, appears by the case<sup>(h)</sup> in Goldsborough and Leonard, to have prevailed as early as the twentieth year of the reign of Elizabeth, and the opinion of the judges at that time clearly was, that the title of the denizen to previously acquired lands was thereby fully confirmed. If the crown does not now retain the right to confer that privilege, it must have been restrained by some subsequent statute, and no restraining statutes are referred to, except those which limit the right of the crown as to the granting of lands. The privilege of the denizen to retain and enjoy lands which he had previously acquired, is not to be considered as a grant of lands from the crown. The crown, indeed, had an inchoate title by which it might have acquired those lands, but, at the date of the letters of denization, it had not the lands to grant; and to give a construction to the statutes referred to which would reach this case, appears to me

(a) Mentioned 1 Leon. 280.

(b) Sir T. Raym. 83.

(c) 2 Rep. p. 53.

(d) Anon., Golda. 2, pl. 4; 1 Leon. 47, pl. 61; 4 Leon. 82, pl. 175.

(d) Co. Litt. 241 a.

(e) Plowd. 477.

(g) Tit. Prerogatives, 89 (D.)

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to be opposed to the principles applicable to the expounding of all statutes which concern the crown.

[\*408] \*Upon the best consideration, therefore, I am able to give this case, I am of opinion that this testator had power to devise the freehold and leasehold lands in question.

The effect of the testator's will is to create a mixed fund, consisting of the produce of his real and personal estate, which he directs to be sold and converted into money by his executors; and, subject to his debts and legacies, he gives such produce to his surviving brother and sister, who, at the time of his death, were aliens resident in a foreign country. The freehold and leasehold premises retained their proper quality at his death, and passed by his will not as money, but as freehold and leasehold estate, and no interest in them can vest in his brother and sister, who were aliens.

To the general personal estate they were entitled under the will, and the rule now to be applied is the same as prevails in case of charities. The freehold and leasehold estate, and the general personal estate, must severally bear a proportion of the debts and legacies according to their respective values, and it must be referred to the Master to ascertain such values; and after the payment of that proportion of the debts and legacies which will be chargeable on the general personal estate, the residue of that personal estate will belong to the sister in her own right, and as administratrix of her deceased brother; and the residue of the general estate arising out of the testator's interest in lands, after discharging in like manner its proportion of the burden, will belong to the crown.

[\*409] \*Another point was made with respect to two legacies claimed under the testator's will by Mary Ann Myers and Anna Jewitt. Mrs. Fourdrin, by her will already mentioned, among other legacies, had given to her daughter in law, Mary Ann Myers, 100*l.*, "to be paid to her for her sole use, upon her separate receipt, and independent of her husband;" and to her sister's daughter, Anna Jewitt, she gave 100*l.*; and by a clause at the end of the will, she left it entirely at her husband's discretion, either to pay her legacies during his lifetime, or to direct them to be paid by his executors after his decease. Francis Fourdrin, the husband, who was her residuary legatee, continued, after her death, in possession and enjoyment of all the property which his wife had bequeathed to him, but did not pay any of her pecuniary legacies. By his will, made after his wife's decease, he directed his executors to pay, among other legacies, to Anna Jewitt, daughter of his late wife's sister, 500*l.*, and to Mary Ann Myers, 100*l.*; and a question now arose, whether these bequests were a satisfaction of the sums respectively bequeathed to Anna Jewitt and Mary Ann Myers by his wife's



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will, or whether they were given in addition to those sums. Mary Ann Myers, at the time of the testator's death, continued under coverture.

Mr. *Beames*, for the plaintiff, insisted that the legacies given by the husband's will were a satisfaction of those to which the legatees were entitled under the will of the wife.

Mr. *Lovat* for the legatees.

\*The MASTER OF THE ROLLS said, that this was a question not of satisfaction, but performance. The husband, by the condition on which he took the general residuary property of his wife, was bound either to pay these pecuniary legacies in his lifetime, or to provide for their payment after his death. He was clearly of opinion, that, by the bequest of 500*l.* to Anna Jewitt, the testator had performed his obligation, so far as her legacy was concerned. The question upon the other legacy was more nice, as the two legacies were of different characters; the one being given to the lady generally, and the other to her sole and separate use; and it would be satisfactory to have it further argued. [\*410]

*May 1st.*—The question was again argued by Mr. *Lovat*, on behalf of Mary Ann Myers; and the following authorities were referred to; *Blandy v. Widmore*, (a) *Lee v. D'Aranda*, (b) *Gartshore v. Chalie*, (c) *Goldsmid v. Goldsmid*, (d) *Wathen v. Smith*, (e) *Adams v. Lavepder*. (g)

THE MASTER OF THE ROLLS:—This is a legacy of a different quality from the legacy given to Mrs. Myers by the will of the wife. I cannot annex to the latter a limitation different from that which the testatrix has herself annexed to it; and I think, therefore, that Mrs. Myers is entitled to both. Let it be declared, that the legacy of 500*l.* is a performance of the obligation on the testator, to satisfy the legacy of 100*l.* given to Anna Jewitt; and that with respect to all the other legacies, they remain a charge upon the testator's estate.

(a) 1 P. Wms. 324.

(b) 1 Ves. sen. 1.

(c) 10 Ves. 1.

(d) 1 Swan. 211.

(e) 4 Mad. 325.

(g) 1 Maccl. & Y. 41.

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[\*411]

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A bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends and profits as may be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four without leaving issue, is not void as too remote, but gives a present vested interest, with an executory bequest over in case of death under twenty-four without leaving issue.

THE residuary clause in the will of Samuel Meymott gave and bequeathed all the rest, residue and remainder of his estate and effects to trustees, upon trust to convert the same into money, and after investing such money in the government funds, or on good security, then upon trust to receive the rent, interest, dividends and proceeds thereof, as the same should become due and payable, and thereout pay unto his daughter, Elizabeth Sarah Bland, the wife of William Bland, for her life, a clear annuity of 300*l.*, by equal half-yearly payments, to her sole and separate use. The testator then proceeded in these words: "And from and after the decease of my said daughter, upon trust to receive the said rent, interest, dividends and proceeds of all my estate and effects, and to pay, apply and dispose of the same, or a sufficient part thereof, for and towards the maintenance, education and bringing up of all and every the child or children of my said daughter, until they shall severally and respectively attain their ages of twenty-four years; and when, and as they shall severally and respectively attain that age, then upon trust, to pay, assign, transfer and convey all the said residue of my estate and effects, with the interest, dividends and proceeds thereof, as shall not have been applied for and towards their maintenance, education and bringing up, equally unto and amongst all her said children, when, and as they shall severally and respectively attain their said age of twenty-four years; and in case any or either of her said children shall happen to die before having attained

[\*412] that age, and without leaving lawful issue of \*his or her body, then in trust to pay, assign, transfer and convey all the said residue of my estate and effects unto such of her said children as shall live to attain his, her, or their respective ages of twenty-four years, share and share alike, if more than one, and if but one, then the whole to that one child; and my will is, that the part or share of such of them as shall be a daughter or daughters, shall not be subject to the debts, control, or engagements of any husband or husbands she or they may marry. But in case all and every of her said children shall happen to die under that age and without leaving lawful issue, as aforesaid, then upon trust to pay the interest, dividends and annual produce thereof

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unto my said son in law, William Bland, if he shall be then living, for and during the term of his natural life; and from and after his decease, in trust to pay, assign, transfer and convey all the said residue of my said estate and effects, unto such person or persons as may be entitled thereto as my next of kin."

The testator died shortly after the execution of his will, and left his daughter, Elizabeth Sarah Bland, the wife of William Bland, his only next of kin.

The bill was filed by Mr. and Mrs. Bland against the trustees and executors of the will, and against their infant children; and the material question in the cause was, whether the interests limited to the children of the testator's daughter, Mrs. Bland, did not fail as being too remote, in which case such interests, being undisposed of, would vest in her as the testator's next of kin.

Mr. *Pemberton* and Mr. *Girdlestone*, sen., for the plaintiffs:— Upon the first part of the will, the bequest would clearly be contingent; and the only doubt arises upon the subsequent \*part of it, by which it is provided, that in case any of [\*413] the daughter's children shall happen to die before they attain twenty-four, and without leaving lawful issue, the trustees shall hold the residuary estate in trust to transfer and convey it unto such of the children as shall live to that age; but in case all the children shall die under that age, and without leaving lawful issue, then upon trust for the testator's son in law, for life, &c. These provisions seem to furnish an inference, that the children who left issue were to take vested interests at all events, whether they attained the prescribed age or not. Besides, the ulterior bequest, in trust to pay, assign and convey the testator's residuary estate unto such of the children as should live to attain twenty-four, being in point of form a limitation to take effect only in case some of the six children should happen to die under that age, and without leaving issue, appears inconsistent with the notion that the prior gift was to vest in those only who should live to twenty-four; for if the children were, in no event, to take vested interests until they reached twenty-four, of course there would be nothing to give over. According to the general rule, which was fully considered in *Leake v. Robinson*,<sup>(a)</sup> and has been repeatedly recognized and acted upon in the recent cases, the legacies, if contingent, would be unquestionably void on the ground of remoteness. In *Leake v. Robinson*,<sup>(a)</sup> the bequest over in case of death without issue, did not occur, but in other respects, that case resembled the present. In *Farmer v. Francis*<sup>(b)</sup> where the question was, whether the interests taken by the children were vested, or whether they were contingent on

(a) 2 Mer. 363.

(b) 2 Bing. 151; 12 Sim. &amp; Stu. 505.

1834.—Bland v. Williams.

their attaining twenty-four, it was held that the first [\*414] part of the bequest amounted to an immediate \*gift, and that the subsequent expression, "to be divided at twenty-four," did not suspend the vesting. In *Bull v. Pritchard*,<sup>(a)</sup> where the same limitation over as is found here, occurred, viz., in case all the children should die under twenty-three, without leaving issue, Lord Gifford decided that the vesting was to depend on the children attaining the specified age, but the implication arising from the peculiar form of the limitation over was not pressed in the argument, or noticed in the judgment, which apparently proceeded upon *Leake v. Robinson*. In *Vawdry v. Geddes*<sup>(b)</sup> and *Judd v. Judd*,<sup>(c)</sup> there was no limitation over upon the death of the prior takers without issue.

The question then comes to be whether the circumstance of the gift over to the children who attain twenty-four, coupled with the qualification annexed to it, that the others who die under that age shall leave no issue, does not by implication give a vested interest to all the children, liable to be divested on the happening of the specified event, and so prevent the limitation to them from being too remote. It is impossible to deny that the argument founded on the bequest to the children who attain twenty-four, being in its form a gift over, is strengthened by the condition superadded, that those who die under that age shall leave no issue, inasmuch as it suggests a reason why the testator should have contemplated its vesting in some of the children and not in others. But that is only a circumstance to have its weight in collecting the intention of the testator, and probably will not be thought sufficient to countervail and overrule the clear and express language in which the testator in the earlier part [\*415] of the will directs the \*trustees to convey and assign the residue of his estate to such of his daughter's children as shall attain the age of twenty-four, when and as they shall respectively attain that age; language which necessarily imports a continuing contingency.

Mr. *Bickersteth* and Mr. *Teed*, for the executors.

Mr. *Wailes*, for the children of Mrs. Bland :—The circumstances referred to by Mr. *Pemberton*, strongly favor the opinion that the testator intended his daughter's children to take vested interests from the first, liable to be divested in the event of their dying under twenty-four, and without leaving lawful issue. That certainly was a natural, as well as a probable purpose, and it would be entirely defeated by holding that the interests given to

(a) 1 Russ. 213.

(c) 3 Sim. 525.

(b) 1 Russ. &amp; Mylne, 203.

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the children were contingent, in which case they would fail on the ground of remoteness, and the residuary estate, being then undisposed of, would devolve on the testator's daughter. The question is one purely of intention, and nothing can be a stronger indication of the testator's intention than the direction that the gift over, contained in the second clause, to the children who attained twenty-four, should take place in the event of the others who died under that age leaving no issue. If those others died leaving issue, the necessary inference is, that such issue were to be considered as having taken vested interests. Can it be supposed that the testator intended that if any of the children died under twenty-four and left issue, the issue should be wholly unprovided for? *Doe v. Cundall*.<sup>(a)</sup> It is further to be observed, that the whole of the interest might be applied, till the children reached the prescribed age, towards their education and maintenance; a very material \*circumstance in a ques- [\*416] tion of vesting. None of the cases cited, with perhaps the exception of *Bull v. Pritchard*, in which the point was not taken, come up to the one now before the court. In *Leake v. Robinson*, there were expressions which clearly indicated that the testator looked to a future period as the time when the interests should vest, and that in the meantime they were to remain in contingency. In that case, however, Sir W. Grant says, that if there were an antecedent gift, a direction to pay upon the attainment of twenty-five, would certainly not postpone the vesting, and the question is, whether there is not by implication such antecedent gift to the children here. Sir W. Grant afterwards observes, in commenting on the circumstances of *Leake v. Robinson*, "Here interest is not given to children dying before twenty five; children attaining twenty-five are to take the whole. There is not even a provision for the case of a child dying under twenty-five leaving issue; all is to go to those who do attain twenty-five. How is it possible, therefore, that a child can be said to have a vested interest before twenty-five, when it has neither a right of enjoyment, a capacity of transmission, or a ground of claim until after it shall have attained that age?" These observations, contrasted with the circumstances of the present case, have a direct bearing on the question before the court, and strongly support the argument that the children took a vested interest in their shares, liable to be divested in the event of death under twenty-four, without leaving issue, and that construction reconciles every part of the will.

THE MASTER OF THE ROLLS:—Whether in a gift of this nature the time of vesting is postponed, or only the time of

(a) 9 East, 400.

1834.—King v. Badely.

[\*417] payment, depends altogether \*upon the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age. In this case, the gift over is not simply upon the death under twenty-four, but upon the death under twenty-four without leaving issue. If upon a death under twenty-four, at whatever age issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest with an executory devise over, in case of death under twenty-four, without leaving issue. All the cases upon the subject, except the one before Lord Gifford, (a) are reconcileable with this distinction.

(a) *Bull v. Prichard*, 1 Russ. 213.

### KING v. BADELEY.

ROLLS.—1834: 4th June.

A testator, having devised his estates in a particular way, directed that a different disposition of them should take place in case certain contingent property and effects in expectancy should fall in and become vested interests to his children. The children being entitled to no contingent interests at the date of the will, the court refused to admit evidence offered for the purpose of showing that the testator referred to expectations from particular individuals, which had been afterwards realized, as being in effect to add to the will, and not to explain it.

ISAAC KING, by his will bearing date the 24th of August, 1827, which was duly executed and attested so as to pass real estate, devised all his property of what nature soever to trustees, their heirs and executors, for the use of his wife for life, for the maintenance and support of herself and of such of his children as should be living with him at the time of his decease, and after the death of his wife for the use of all his children equally, as tenants in common in fee. The testator also empowered his trustees at any time during the life of his wife to sell his [\*418] real estate, and to hold the \*produce thereof, upon the same trusts. The will then contained the following proviso:—"Provided always, and my will and meaning further is, that in case certain contingent property and effects in expectancy shall fall in and become vested interests to my children during the life of my said dear wife, and my said trustees or trustee shall not have exercised the power of sale hereinbefore given to them, then I do hereby request, authorize and empower my said dear wife, with all convenient speed, thereafter, by such good and sufficient assurances as counsel in the law shall advise, to convey, limit, settle and assure all that my messuage or tenement and mill, called Pau Mill, with the rights, members, appendages and appurtenances thereto belonging, situate in the parish of Chipping Wycombe, in the said county of Bucking-

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1834.—King v. Badeley.

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ham; and also all that my messuage or tenement, and farm-house, lands, hereditaments and premises, situate in the parish of Dinton, in the said county of Buckingham, part of the hereditaments hereinbefore devised or intended so to be, to the use of my eldest son, Isaac King, and his assigns, for and during the term of his natural life, without impeachment of waste." The will then proceeded to limit certain remainders over, after the death of the eldest son.

Afterwards, and in the lifetime of the testator, John Ewer, a relation of the testator's wife, from whom the testator entertained great expectations of benefit to his family, died, having by his will given the residue of his personal estate and effects, upon trust, to Mary Shrimpton, for life, with remainder to the testator's wife, for life, and after her death the capital to be divided among all her children by the testator. Shortly after this event the testator made a codicil to his will, bearing date the 8th day of May, 1828, which was signed by him, but was not in any manner attested, and was in the following words: [\*419] "As part of the expectations mentioned in my will have been realized, after his mother's decease I should wish that my eldest son should have none of the personal estate, but the mill and farm at Dinton, strictly entailed, the profits not to be received by him till the mortgage has been paid off."

In the year 1832, after the death of the testator, Mary Shrimpton, who was also related to Mrs. King, and from whom the family had considerable expectations, died, in the lifetime of the testator's widow, and before the testator's estates were sold by the trustees; and by her will certain other benefits were given to Mrs. King, the widow.

The bill was filed by the testator's eldest son, who, in the events which had happened, claimed to be entitled to a life estate in the messuage called Pau Mill, and in the farm and lands at Dinton, by virtue of the proviso contained in the will and hereinbefore stated. The defendants were the trustees under the will, and the widow and younger children of the testator.

The questions in the cause were, whether that proviso, taken by itself, was void for uncertainty; and whether parol evidence was admissible in order to explain it and to show what the testator meant by the words "in case certain contingent property and effects in expectancy shall fall in and become vested interests to my children during the life of my said wife." Another question was, whether the unattested codicil of May, 1828, might not operate so far as to exclude the eldest son from any share of the personal estate, although it could not amount to an effectual devise of the real estate.

\*It was admitted that the children of the testator [\*420] were not entitled to any contingent interests properly

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 1834.—King v. Badeley.
 

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so called; and the evidence tendered was adduced for the purpose of proving that the testator entertained expectations of bounty to his children from Mr. Ewer and Mrs. Shrimpton, and that the proviso in the will referred to those expectations.

The MASTER OF THE ROLLS, on the case being opened, stated his opinion, that it would be impossible upon the codicil to hold the eldest son to be excluded from his share in the personal estate, except on condition of his taking the real estate therein mentioned; and further, that, as the codicil had not been duly executed, it could not be read, unless it were admissible as a declaration of the testator's intention, and used as evidence to prove or explain the proviso in the will.

Mr. *Pemberton* and Mr. *Chandless*, for the plaintiff:—Such being the opinion of the court, the only question is, whether parol evidence, including this unattested codicil, may not be admitted to explain and ascertain the testator's meaning. Observe for what purpose and under what circumstances the evidence is offered. The testator directs that in a specified event, which he describes in general terms as the falling in and vesting of certain contingent property and effects in expectancy during the life of his wife, a particular disposition of his estate shall take place, differing from that which he had otherwise contemplated; and the inquiry is, what are the contingent property and effects in expectancy, the falling in and vesting of which are here referred to as the ground of the altered disposition? The testator has expressed his meaning; but he has done so carelessly and imperfectly; and the evidence is tendered for the purpose of [\*421] supplying the defect, and giving \*certainty to that which, on the face of the instrument, is ambiguous and obscure. The evidence is not tendered to add to or alter his will, nor to show that he intended to give something which he has not expressed. For such a purpose certainly it could not be received. It is adduced simply for the purpose of putting a definite construction upon language which in itself is vague and equivocal, and therefore, without such aid, likely to raise doubt—for the purpose of bringing out fully and precisely what the generality of the expression has left uncertain. As in the case of a devise of lands in the parish of A., parol evidence is admitted to show what property the testator had in the specified locality; so here contingent property and expectancies, however generally mentioned, must have had in the testator's mind a definite meaning; and all that is now proposed is to show by parol evidence, and especially by the unattested codicil, which reduces the matter to a certainty, what that meaning must have been. Suppose the testator had said,—Whereas I have expectations from the wills



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of my relations, now if those expectations are fulfilled within a limited time I direct so and so;—can there be a doubt that parol evidence might be read to show that his expectations had been realized? And that is exactly the present case. Modern authorities have decided that parol evidence, though not admissible in order to give a meaning where the testator has expressed none, may yet be received in aid of the construction where the meaning on the face of the will is equivocal, and that, not only by ascertaining and identifying the subject of the disposition and the party to whom it is given, but also by showing the state of the testator's family and property at the time when the will was made, so as to place the court as nearly as may be in the position in which the testator stood, and thus enabling it to see with his eyes and fully to understand his \*feelings; [\*422] *Jeacock v. Falkener*; (a) *Fonnereau v. Poyntz*; (b) *Smith v. Lord Jersey*; (c) *Doe dem. Oxenden v. Chichester*; (d) *Hewson v. Reed*; (e) *Druce v. Denison*; (g) *Heming v. Whittam*; (h) *Jones v. Morgan*; (i) *Lowe v. Lord Huntingtower*; (k) *Pycroft v. Gregory*. (l) The cases are all collected by Mr. Roper, (m) and the doctrines to be deduced from them are ably summed up in Mr. Wigram's Treatise. (n)

Mr. Turner and Mr. Fisher contra:—This evidence is said to be offered for the purpose of aiding the construction of an ambiguous expression; but in fact it seeks to supply, not to explain, an intention; it is used to give a meaning where none has been imperfectly expressed; and if it were admitted, the court would go a great way to repeal the Statute of Frauds and the Statute of Wills also. The vagueness in the description of the contingent property and expectancies, which the testator had in his mind, can never be removed by parol evidence, because the nature of the contingency and expectancies lay concealed in his own breast. No after made declarations with respect to them can be used for the purpose of ascertaining what they were, because the will itself contains nothing definite to which such declarations could be safely referred. The expectations might be from the result of the testator's own successful speculations—from the bounty of relations or friends—\*of bene- [\*423] fits to come to him by deed or by will—who shall say from what source or quarter they might not be derived? They might be totally different at different periods, of one kind at the

(a) 1 Bro. C. C. 295; 1 Cox, 37.

(b) 1 Bro. C. C. 472.

(c) 2 Brod. &amp; Bing. p. 553.

(d) 4 Dow. 65.

(e) 5 Mad. 451.

(f) 1 Rop. on Leg. ch. 2, secs. 17, 18, 19, ch. 4, s. 4, 3d ed.

(g) 6 Ves. 385.

(h) 2 Sim. 493.

(i) Fearne's C. R. 577.

(j) 4 Russ. 532, n.

(k) 4 Russ. 526.

(l) 4 Russ. 526.

(m) 1 Rop. on Leg. ch. 2, secs. 17, 18, 19, ch. 4, s. 4, 3d ed.

(n) On the Admission of extrinsic Evidence in the Interpretation of Wills.

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date of the will, of another kind at the date of the codicil. To permit the testator to specify them, or rather to fix upon them by a parol declaration, or by a subsequent unattested paper, would be nothing short of allowing him to make a parol addition to his will. Had any contingent interests existed to which the children were actually entitled, there might have been some foundation for the argument; for those, however uncertain and doubtful in enjoyment, would still have had a legal and definite existence; but mere expectations (and it is admitted that the testator's children had nothing more) are far too shadowy and unsubstantial to be capable of being identified or reduced to certainty by the assistance of parol evidence. For these reasons the cases referred to have no application. Even in an express reference from one paper to another, the subject intended to be referred to must be clearly and precisely described, so as to be at once identified; *Molineux v. Molineux*.(a) In *Smart v. Prujean*,(b) an unattested paper, which was found folded up in the will, and which gave a number of legacies charged on the testator's real estates, was not allowed to operate because it was not sufficiently identified, or by reference incorporated with the will. It was laid down by Mr. Justice Tracey, that "If a devise be to one of the sons of J. S., who hath several sons, the devise is void, and shall not be supplied by any parol proof; nor is any regard to be had as to expressions before or after making the will, which possibly might be used by the testator, on purpose to control or disguise what he was doing, or to keep the [\*424] family quiet, or for other secret motives and \*inducements."(c) The same doctrine is recognized in *Allham's case*.(d) So also in *Castledon v. Turner*,(e) where a doubt arose whether a legacy belonged to the testator's wife or niece, in consequence of the equivocal application of the word "her," Lord Hardwicke, following the principle laid down in *Cheyney's case*,(g) refused to admit parol evidence to explain the intention, and upon the construction of the words themselves decided in favor of the wife. The cases referred to on the other side are all cases of inaccurate description, and where the inaccuracy left it in doubt what particular subject matter the testator meant. Here there is not merely an inaccuracy, but a deficiency of description on the face of the instrument. The rule is that the ambiguity must first be raised by parol evidence, on the result of inquiry; and then it may be removed by the like evidence; *Doe v. Oxenden*;(h) *Doe v. Lyford*.(i) If admissible, it cannot be read

(a) Cro. Jac. 144.

(b) 6 Ves. 560.

(c) 2 Vern. 624.

(d) 8 Rep. 148.

(e) 3 Atk. 257.

(g) 5 Rep. 68.

(h) 4 Dow. 65.

(i) 4 M. &amp; S. 550.

1834.—King v. Badeley.

to contradict or control the will; *Ulrich v. Litchfield*; (a) *Hampshire v. Peirce*; (b) *Goodinge v. Goodinge*; (c) *Mounsey v. Blamire*. (d) A testator must be taken to have meant only what he has expressed; *Powell v. Mouchett*. (e) The objection to parol declarations applies with double force to such as are not contemporaneous, but were made some time before or after the execution of the will; *Strode v. Russell*; (g) *Thomas v. Thomas*. (h)

Mr. Pemberton in reply:—The purpose for which the evidence is offered has been mistaken. It is not contended that the plaintiff is \*entitled to show, by parol declarations, that [\*425] the testator meant by his will something which he has not expressed, or something different from what he has expressed. The argument is, that the court is bound to look at all the circumstances under which the will was made, and ought, therefore, to be made acquainted with the nature of his property, whether actual or contingent, real or supposed, his prospects and expectations, his situation with reference to his family and relations, in order the better to collect his intention from the expressions he has used; and that for that purpose the evidence tendered is material. It is necessary to look to the objects he had in view, in order to understand what those expressions meant; and that can only be done after the court is fully cognizant of the circumstances in which he stood, and which would naturally operate as motives on his mind, in making a final disposition of his worldly affairs. Upon that ground, and with that purpose, the evidence is clearly admissible to assist the court in coming to a sound construction of a meaning which is ambiguously expressed. It may not go a great way to clear up the ambiguity; but *valeat quantum*, and of its value the court will judge.

THE MASTER OF THE ROLLS:—If at the making of the testator's will his children had been entitled to any contingent interests, evidence would have been plainly admissible to ascertain those interests, because the expression of contingency has a definite legal meaning, and *id certum est quod certum reddi potest*; and the evidence would have explained, but would not have added to the will. To admit evidence to show that the testator referred to expectations from Mr. Ewer, would not be to explain the expressions of his will, but to add to his will that which he has not expressed. The evidence offered, must, therefore, be rejected.

(a) 2 Atk. 372.

(b) 2 Ves. sen. 216.

(c) 1 Ves. sen. 231.

(d) 4 Russ. 384.

(e) 6 Mad. 216.

(g) 2 Vern. 621.

(h) 6 T. R. 671.

1833.—Hall v. Hutchons.

[\*426]

\*HALL v. HUTCHONS.

ROLLS.—1833: 9th November.

In general, a release to the principal debtor is, in equity, a release to the surety; but if the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety.

THE bill was filed by a simple contract creditor against the defendant, James Hutchons, as personal representative of William Hall, the younger. The usual decree and reference having been made, and the Master having, among other things, allowed a claim made on the part of the administratrix of William Gurney, deceased, against the estate of William Hall, the younger, to the sum of 268*l.* 15*s.* and interest, an exception was taken by the defendant to that part of the Master's report. The claim was made under the following circumstances:

On the 15th of May, 1823, William Hall, the elder, and William Hall, the son, executed to William Gurney a warrant of attorney to confess judgment for the sum of 5,000*l.*, and upon that warrant of attorney, judgment was entered up, subject to a defeasance, which recited that the judgment was to secure the payment of 3,150*l.* and interest, due from William Hall, the elder to Gurney. William Hall, the elder, had previously accepted several bills of exchange by way of security for the debt; and among others a bill of exchange for the sum of 500*l.*, dated the 1st of January, 1823, and payable thirty-three months after date.

In September, 1824, William Gurney died intestate, and his daughter, Ann Barton, took out administration of his estate and effects. When the bill for 500*l.* became due, William Hall, the younger, made a proposal to Robert Barton, the solicitor of Ann

[\*427] Barton, to pay 300*l.* in part payment, and to give the joint acceptance of \*himself and his brother, Charles Barton, for the remainder of the principal and interest at three months. The bill given upon this occasion was indorsed by Robert Barton to Messrs. Henderby & Son, for valuable consideration, and not being paid when it became due, it was renewed by a bill for the same amount, accepted by the same parties, and made payable in one month; and the renewed bill was also indorsed over to Messrs. Henderby & Son, all interest due upon the former bill having been paid by William Hall, the younger.

By an indenture, dated the 11th of April, 1826, William Hall, the elder, assigned to Robert Barton and two other trustees, and the survivor, &c., all his effects upon certain trusts for the benefit of his creditors; and the indenture further witnessed, that in

1833.—Hall v. Hutchons.

pursuance of the agreement in that behalf, and in consideration of the covenants and agreements thereinbefore contained on the part of William Hall, the elder, the several creditors, parties to the said indenture, did fully and absolutely release, acquit and discharge William Hall, the elder, his heirs, executors and administrators, of and from all and every the debts and sums of money then due and owing from him, William Hall, the elder, to the several creditors, parties thereto, or any of them, and of and from all accounts and reckonings whatsoever, then subsisting between them or any of them, and William Hall, the elder; and of and from all and all manner of actions and suits, cause and causes of action and suit, judgments, executions, bills, bonds, notes, claims and demands, whatsoever at law and in equity. And it was by the said indenture expressly agreed and declared between and by the parties thereto, that the executing the same by any person or person who was or were a creditor or creditors of the said William Hall, the elder, should not annul, affect, or prejudice any deed or deeds, security \*or se- [\*428] curities, which such creditor or creditors had then or theretofore for his, her, or their debt or debts, or the payment thereof, or any part thereof.

This deed was executed by Robert Barton, on behalf of Ann Barton, the administratrix of Gurney, and in the schedule to the deed, the sum of 1,750*l.* was set opposite to the name of Robert Barton, as the amount of his claim against William Hall, the elder.

Mr. *Pemberton*, in support of the exception, contended that William Hall, the younger, had, by the transaction between him and the creditor, taken upon himself the debt of his father; and that the remainder of the debt for which he became liable, was in no degree affected by the subsequent release of the creditor to William Hall, the elder.

Mr. *Bickersteth* and Mr. *Chandless*, *contra*, insisted that, although the acceptor of a bill of exchange was at law treated as the principal debtor, yet in equity he was considered only as a surety, and in that court a release to the principal debtor was a release to the surety.

THE MASTER OF THE ROLLS:—Generally speaking, a release to the principal debtor is a release to the surety; but if the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety for the remainder of the debt. I am of opin-

1834.—Salmon v. Osborn.

ion, therefore, that the claim made against the estate of William Hall, the younger, was properly allowed by the Master.

Exception overruled.

[\*429]

\*SALMON v. OSBORN.

ROLLS.—1834 : 23d July.

The court will not order the payment of a fund in court, to which petitioners are declared to be entitled by an award made under an order of reference, until the award has been made a rule of court.

THE bill was filed for the purpose of having the testator's estate administered under a decree of the court; but, by consent of all parties to the suit, all matters in the cause were, by an order of the court, referred to the arbitration of Mr. Wyatt. Previously to that order, the sum of 1,875*l.* new 4 per cent. annuities had, by an order in the cause, been transferred into the name of the Accountant-General for securing the payment of an annuity given by the will.

By the award of the arbitrator, the petitioners, who were three of the residuary legatees of the testator, were declared to be entitled to five-sixths of the above mentioned sum of 1,875*l.* new 4 per cent. annuities, subject to the life interest of the annuitant. On the death of the annuitant the present petition was presented for the payment of the five sixth shares to the petitioners, in the proportions found due to them respectively by the award, and a similar petition was at the same time presented by the party declared by the award to be entitled under the will to the remaining sixth share.

The award had not been made a rule of court, and a doubt being suggested by the registrar, when the petitions first came on to be heard, whether, until the award had been made a rule of court, an order for the payment of the shares to which the residuary legatees were entitled could be drawn up, the petitions stood over in order that that point might be inquired into.

[\*430]

\*Mr. *Heathfield*, for the petitioners entitled to five sixth parts of the fund, now submitted that they were entitled to payment without having the award made a rule of court, and he cited the case of *The Marquess of Ormond v. Kynnersley*,<sup>(a)</sup> where the very point was raised upon motion, and after the motion had stood over that search might be made for authorities, the court held, upon the authority of a case of *Sibley v. Saffel* before Lord Eldon, referred to at the bar, that the court would enforce an award made by virtue of an order of the court,

(a) 2 Sm. & Stu. 15.

1834.—Nichols v. Roe.

without requiring that the award should first be made a rule of the court. In the present case all the parties entitled under the award to the fund in court were before the court, and, as there was a direct authority which left no doubt as to the jurisdiction of the court, it was desirable that the unnecessary expense of making the award a rule of court, which all parties were ready to dispense with, should be saved.

Mr. *Rudall*, who appeared on the other petition, for the party entitled to the remaining sixth share, also desired to waive the making of the award a rule of court.

THE MASTER OF THE ROLLS:—The award must be made a rule of court; for the court must know judicially what the nature of the award is, before it can act upon it by directing the payment out of court of the fund claimed by these petitioners.

## \*NICHOLS v. ROE.

[\*431]

ROLLE.—1834: 5th June and 9th August.

Where it was one of the terms of an agreement to refer disputes to arbitration, that the submission might be made a rule of a court of law at the option of either party; and, a bill having been filed to set aside the award, it appeared by the answer of the defendant that the submission had been made a rule of the Court of King's Bench by the defendant subsequently to the filing of the bill, the common injunction which had been obtained by the plaintiff was, upon appeal, dissolved, the Lord Chancellor holding that the Court of Chancery had no jurisdiction to relieve against the award.

By articles of agreement, dated the 12th of August, 1833, the plaintiff and defendant agreed to refer all controversies then existing between them to the determination of two persons therein named, provided they made their award within a month from the date of the articles of agreement; and, in case the arbitrators should not agree upon their award within that time, then to the determination of an umpire to be appointed by them, provided he should make his award in writing under his hand and seal within a month from the time of the reference to him; and it was further agreed that no action, suit, or proceeding at law or in equity should be commenced or prosecuted by either of the parties to the agreement against the other of them, in relation to the matters aforesaid, until the award or umpirage should have been made and delivered. And it was further agreed that the said reference or submission should or might be made a rule of the Court of King's Bench, on the application of either of the parties thereto, and that no action or suit at law or in equity should be commenced or prosecuted against the arbitrators or umpire concerning their or his award or determination, after the

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same should have been so made as aforesaid; and that the said award or umpirage should not be impeached, unless some collusion or other fraud should be discovered therein. And it was further agreed that the costs should abide the event of the award, and should be borne and paid by the party or parties by whom the same should be thereby directed to be paid.

[\*432] \*The arbitrators, not agreeing in their award, in pursuance of the power given to them by the agreement, appointed an umpire, who made his award, dated the 12th of October, 1833, and thereby directed that the plaintiff should, on the 1st of November then next, pay to the defendant the sum of 208*l.* 10*s.*; and that the same should be received by the defendant in full satisfaction and discharge of and for all the matters in difference; and that all such costs as, by the articles of agreement, it was agreed should abide the event of the award, should be paid at the time before appointed for the payment of the 208*l.* 10*s.*

The bill was filed on the 4th of November, 1833. It charged that the umpire had not made a full and final arbitrament of the matters referred to him, but that the award was defective, and ought to be set aside. It further charged that the defendant had not, at the time of filing the bill, made, but that he forthwith intended to make the submission to refer to arbitration, contained in the articles of agreement, a rule of the Court of King's Bench or of some other court of record; and it prayed that the award might be declared void, and that the defendant might be decreed to deliver it up to be cancelled; and that, in the meantime, the defendant might be restrained from making the submission a rule of court, and from bringing any action at law against the plaintiff upon the articles of agreement and award, or either of them.

The defendant put in a general demurrer, which was, after argument, overruled by the Vice-Chancellor on the 11th of January, 1833.

On the 16th of November, 1833, the defendant caused the submission to arbitration to be made a rule of the Court of King's Bench. On the 26th of March, a motion was made before the Vice-Chancellor, on the part of the defendant, to dissolve the common injunction which had been obtained by the plaintiff for want of an answer. That motion, after argument, was refused, and the order, granting the injunction, was continued. An appeal was now brought by the defendant against that order.

The arguments and judgments upon the demurrer and motion for dissolving the injunction, are fully reported in the fifth volume of Mr. Simon's Reports, p. 156.

The *Solicitor-General* and Mr. *Purvis* for the appellant:—



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There are three grounds, upon any one of which the defendant is entitled to have the injunction dissolved. In the first place, the statute is as imperative upon a court of equity as upon a court of law; secondly, the recent decisions are conclusive against the plaintiff; and, lastly, if either of those points were doubtful, there is a total absence of equity upon which the plaintiff can claim the interference of the court against the legal right of the defendant. The object of the Statute 9 & 10 W. III, was to terminate disputes between parties, and it is "in order to the final determination of controversies," that the time within which and the court where an application to set aside an award, shall be made are expressly limited by the statute. The effect of the decision of the Vice-Chancellor, is not only that the award of the arbitrator shall not terminate controversies, but that it shall be a mere preliminary step to the filing of a bill in equity. In *Davis v. Getty*,<sup>(a)</sup> it was one of the terms of the agreement \*to refer the disputes between the parties to arbitration, [\*434] that the submission should be made a rule of the Court of Common Pleas; but, though the submission had not been made a rule of that court, within the time limited by the statute, Sir John Leach held that the court had no jurisdiction to relieve against the award. In *Dawson v. Sadler*,<sup>(b)</sup> the submission to the award had not been made a rule of court at the time of filing the bill, but it was made a rule of court of law within due time subsequently to the filing of the bill, and before a motion for an injunction of which notice had been given was made, so that it was upon all fours with the present case. Upon the motion in that case the court held that it had no jurisdiction; and it is to be observed, that when the present case was heard upon the demurrer, the Vice-Chancellor, although he dissented from the opinion of the Master of the Rolls in *Davis v. Getty*, did not dispute the authority of *Dawson v. Sadler*. On the contrary, having previously mentioned *Gwinett v. Bannister*,<sup>(c)</sup> where the submission had been made a rule of the Court of King's Bench, and Lord Eldon dissolved the common injunction, which had been obtained by the plaintiff, on the ground that the court had no jurisdiction, the Vice-Chancellor says, "In the case of *Dawson v. Sadler* the submission was made a rule of the Court of King's Bench before the motion was made; and, therefore, his Honor might well say, after *Gwinett v. Bannister* had been cited by counsel, that the authority referred to had, in effect, determined the question, and, consistently with prior decision, refuse the motion." And yet, under the same circumstances, when the motion was made in this cause for dissolving the injunction, the Vice-Chancellor continued the injunction. But even sup-

<sup>(a)</sup> 1 Sim. & Stu. 411.<sup>(c)</sup> 14 Ves. 305.<sup>(b)</sup> 1 Sim. & Stu. 537.

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[\*435] posing the court \*to have jurisdiction to entertain the question, an equity must be shown in order to support the injunction; and here there is no charge of corruption or fraud—no complaint whatever on the part of the plaintiff, except that he is not satisfied with the amount of the sum which he has been adjudged by the umpire to pay. It is clear, therefore, upon all these grounds, that the injunction ought to be dissolved.

Mr. Knight and Mr. Webster *contra*.:—If the court had once acquired jurisdiction, that jurisdiction could not be taken away by any matter that occurred subsequently to the filing of the bill. *Davis v. Getty* is a case of the first impression; that case, no doubt, decided that even an agreement to make the submission a rule of a court of law, was sufficient to oust the jurisdiction of this court; and upon the demurrer in the present case the Vice-Chancellor overruled that decision, which was, indeed, supported by no authority. No appeal has been brought from the decision upon the demurrer, and the defendants are precluded, therefore, from saying that the jurisdiction has not been well acquired. If well acquired, how can it be ousted by an act of one of the parties? Though the submission has been made a rule of the Court of King's Bench, it is uncertain whether that court would not, under the circumstances, decline to exercise any jurisdiction; and the burden of proof lies upon the other side, to show that the ancient jurisdiction of this court, once legitimately acquired, can be ousted by an act of one of the parties. If the jurisdiction of this court be liable to ouster by an act of the party, at what stage of the proceedings are we to stop? The court might have continued the injunction upon the merits, and it would still have been

[\*436] competent to the defendant, \*according to the argument on the other side, to set this court at defiance by going to the Court of King's Bench to make the submission to the award a rule of that court. The argument founded upon agreement between the parties avails nothing, unless it could be shown that the plaintiff agreed to give exclusive jurisdiction to the Court of King's Bench; and there is no such agreement in the present case. In *Ward v. Periam*(a) the plaintiff had himself made the submission a rule of court, and yet upon a bill filed by the plaintiff to set aside the award, the court granted the relief prayed by the bill.

The *Solicitor-General* in reply.

August 9th.—THE LORD CHANCELLOR:—This is an appeal

(a) 2 Eq. Ca. Abr. 91, and Turn. & Russ. 131, n.

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motion against an order of the Vice-Chancellor, granting an injunction to restrain the defendant from enforcing an award which he obtained against the plaintiff.

It appears that the defendant Roe was a tenant of the plaintiff Nichols, and, differences having arisen between them, they entered into an agreement on the 12th of August, last, whereby they agreed to refer their differences to arbitration, with a proviso that the reference or submission should be made a rule of court at the option of either party; and that no action or suit should be brought either at law or in equity to impeach the award; and that all fees and moneys awarded by the arbitrator should abide the event of the cause.

The arbitrators could not agree, and called in an umpire, who finally awarded the sum of 208*l.* 10*s.* to \*be [\*487] paid by Nichols on the 1st of November, following, and that all fees, costs, &c., should be paid at the same time.

The reference was made a rule of court some days after the filing of the bill.

Nichols objects to the award on the ground that it is not final, but that it is defective in respect of the moneys, fees, costs, &c., with which the plaintiff is charged, and that it ought to be set aside. But the first question that arises regards the jurisdiction of this court to grant the injunction which has been obtained.

I had some doubt during the argument in this case, though my leaning was strongly against the decision below, and I therefore, and in consideration of the importance of the point, had intended to consult the common law judges. Further reflection has removed all doubt, and convinced me that there is no occasion at all to take that course. The parties too, state that a further delay will be extremely prejudicial, and I am, therefore, now prepared to deliver my opinion.

It is necessary to observe that this was a submission, not in a cause depending either here or at law, but by agreement with the usual power for either party to make the submission a rule of the Court of King's Bench, or other court of record. It was, therefore, altogether under and within the Stat. of 9 & 10 W. III, c. 15, and consequently the proceedings must be governed by that statute, and so must all the rights and equities of the parties.

\*As there was the accustomed clause in the agreement, that no action or suit in equity should be brought by either party to impeach the award, I shall say a word upon that in order to dismiss the point. It has frequently been denied that any such agreement can ever oust the jurisdiction of this court; and in *Nichols v. Chalie*,<sup>(a)</sup> Lord Eldon said the

<sup>(a)</sup> 14 Ves. 265.

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point had never been determined. I need not now determine it; the party against whom the bill to set aside the award is filed, might, had he thought fit, have availed himself of it by plea; but it is quite unnecessary towards the decision of the present question, that anything should be said upon the matter.

When we examine the elaborate remarks of Lord Eldon, in *Nichols v. Chalie*, and what he afterwards says in the subsequent case of *Gwinett v. Bannister*,<sup>(a)</sup> and compare those passages with Lord Loughborough's judgment in *Lord Lonsdale v. Littledale*,<sup>(b)</sup> and look into the arguments at the bar in all the three cases, it is matter of surprise that any doubt should ever have been entertained on the subject. For the statute is undoubtedly repealed in its most express provision; if the jurisdiction continues to reside in this court after the parties have resorted elsewhere under the act. There can be no more plain or distinct terms used than those of the latter part of the first section of the act. After directing process of contempt to issue for enforcing performance of the award, it proceeds thus: "which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear, on oath to such court, that the arbitrators [<sup>\*439</sup>] or umpire \*misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption or other undue means." I may stop here to observe that the courts have long extended this exception to cases of mistake in law: *Kent v. Elstob*.<sup>(c)</sup> Now this prohibition is plainly made to preclude all review of the award, either at law or in equity, excepting on those special grounds. But it is also to be intended as giving to that court only, in which the submission is made a rule, the power of reviewing the award; for, if the literal meaning of the words were adopted, namely, that in the excepted cases either party might go to a court of equity, and make it appear, on oath, that there were grounds for impeaching the award, first, this would prove too much, for it would enable the same party to go to some other court of law; and who ever heard of the Court of Common Pleas setting aside an award, made a rule of court in the King's Bench? or who ever made such an attempt? Indeed, the second section expressly confines the application to the court in which the submission was made a rule; for it says, that "any arbitration or umpirage procured by corruption or undue practices, shall be judged and esteemed void, and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next

<sup>(a)</sup> 14 Ves. 530.<sup>(b)</sup> 2 Ves. jun. 451.<sup>(c)</sup> 3 East, 13.

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term after such arbitration or umpirage made and published to the parties."

Secondly, the words used in the exception to the prohibition of the first section, that the ground of impeachment must be made to appear, on oath, to such court, are the words always used to describe proceedings \*by affidavit; and the [\*440] courts of law and equity are here, and they are throughout the statute, mentioned in the same manner, so that the proceeding is to be alike in all—not a submission made a rule of the court of law, and then a bill filed in equity to set it aside; but the submission to be made a rule either of a court of law or a court of equity, and application made to the same court by affidavit on the behalf of those seeking to impeach the award.

It must further be observed, that the second section affixes a period of limitation—a time within which the application must be made where there are grounds to bring the case within the exception. It shall be "before the last day of the next term after such arbitration or umpirage made and published to the parties." This is very material; for the provision would be rendered wholly nugatory by allowing the party to come here and file his bill, and move for his injunction, which, I presume, he may do within the usual period—that is, at any time within twenty years.

Such being my clear opinion on the construction of the statute, and its bearing upon this question, I have only to observe on the cases, that the older ones are not in similar circumstances to the present, though, as far as they go, they bear out the doctrine I contend for, and tend to exclude the jurisdiction. In this view reference may be had to *Kampshire v. Young*,<sup>(a)</sup> *Chicot v. Lequesne*<sup>(b)</sup> and *Spettigue v. Carpenter*.<sup>(c)</sup> But the parallel cases are the more recent ones in the time of Lord Loughborough and Lord Eldon, which I have already mentioned; *Lord Lonsdale v. Littledale*, *Nichols v. Chalie* and *Gwinett v. Banpister*.

\*The first of these cases was the one in which the [\*441] court sustained its jurisdiction; and Lord Eldon, in *Nichols v. Chalie*, makes some strong observations upon Lord Loughborough's argument in its favor, and plainly doubts, if he does not quite deny the authority of the case. But what prevents its application to the question now before the court is, that *Lord Lonsdale v. Littledale* did not arise at all under the Statute of 9 & 10 W. III. In that case a verdict had been taken at the trial of a cause for nominal damages, subject to a reference, and the award was made a rule of court. This is explicitly allowed by Lord Loughborough not to be a case within or under the statute.

(a) 2 Atk. 155.

(b) 2 Ves. sen. 315.

(c) 3 P. Wms. 361.

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It is true that his Lordship goes on to state his opinion that, even if the case were one of a reference under the statute, he should still hold the equitable jurisdiction not to be excluded. But this is merely an extra-judicial *dictum*, from which, for the reasons above assigned, I take leave to dissent. Lord Eldon, in *Nichols v. Chalie*, nearly overruled it, and in *Gwinett v. Bannister* he did so altogether. These two cases, and the last especially, appear to close the question; and Lord Eldon, in commenting upon the statute, adopts the same construction which I have put upon it. It was a case precisely the same with the present in every particular save one—that here the bill was filed before the submission was made a rule of court, and, in that case, the bill was filed after the submission was made a rule of court. But I do not think that this makes any material difference. In *— v. Mills*(a) a similar distinction was taken, but Lord Eldon disposed of the application on another ground, and said nothing of this. But surely the mere filing of a bill

[\*442] \*cannot be held to destroy the force of the statutory provision, more especially as the party filing the bill might at any moment have applied to the Court of King's Bench. He says his adversary had not made it a rule of court, and so he could not move; there never was a greater mistake: he might himself have made it a rule, and then moved. If not, any one possessed of an award in this form could defeat his adversary's right of moving to set aside the award by not making the submission a rule of court till the period had elapsed within which the statute allows the motion to be made impeaching it. The constant practice is the other way.

It may be further observed, that the mere filing a bill is no interposition of the court, and cannot be struck at by the prohibition of the statute. The order of the court for an injunction, or a decree setting the award aside would be within that prohibition; and it seems difficult to understand how the having done a thing not precluded by the statute, before the submission is made a rule of court, can authorize the doing a thing after that step has been taken, which thing is directly struck at by the statute in the most formal and express words.

I am, therefore, clearly of opinion that the jurisdiction of this court is excluded, as well as that of any other court, in this case, and that the Vice-Chancellor's order for an injunction must be discharged.

(a) 17 Ves. 419.

1834.—Broom v. Broom.

## \*BROOM v. BROOM.

[\*443]

ROLLA—1834: 19th March.

Where the court, by its decree, declares that an infant heir is a trustee, and the right of the party entitled to a conveyance is established by that decree, the court will at the same time direct a conveyance by the infant heir, a petition for that purpose being unnecessary.

At the hearing on further directions, it appeared by the master's report that certain real estates had been purchased by John Broom, the younger, and Herbert Broom deceased, who had carried on business in co-partnership together, out of partnership capital and for partnership purposes. It further appeared that Herbert Broom died intestate, leaving his widow and two infant children, Herbert Broom and Mary Broom, surviving him; and that his widow took out administration to his estate, and afterwards sold her interest in the estates so purchased to John Broom, the surviving partner. The purchase money was not paid, and John Broom, having afterwards become bankrupt, certain portions of the estates were purchased at a sale, under an order in bankruptcy, by the defendants, the assignees. The object of this bill, which was filed by the widow and administratrix of the deceased partner against the infant heir and the assignees of the bankrupt, was to have that sale confirmed, and, for that purpose to have it declared that the share of Herbert Broom in the estates in question became on his decease, personal assets to be administered by his administratrix.

Mr. *Bickersteth* submitted that, upon this finding of the Master, the real estate purchased with partnership capital, and applied to the purposes of the trade, was in a court of equity, to be considered as personalty, and that, therefore, the infant heir of the deceased partner, upon whom the estates had descended, was a trustee for the widow and administratrix of the deceased partner, \*and that a conveyance by the infant trustee to [444] the purchasers might be immediately ordered by the court under the twelfth section of the 1 W. IV, c. 60, which gave authority to the court, on the establishment by decree of the right of the person entitled, to direct a conveyance by the same decree.

Mr. *Rudall*, *contra*, contended that, upon the authorities, it was doubtful whether real estate, purchased with partnership property, was to be considered as real or personal property; and he cited *Thornton v. Dixon*,<sup>(a)</sup> *Bell v. Phyn*,<sup>(b)</sup> *Balmain v. Shore*,<sup>(c)</sup> *Ripley v. Waterworth*,<sup>(d)</sup> *Crawshay v. Maule*.<sup>(e)</sup>

(a) 3 Bro. C. C. 199.

(b) 1 Ves. 453.

(c) 9 Ves. 500.

(d) 1 Ves. 425.

(e) 1 Swanst. 521.

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 1834.—Wain v. The Earl of Egmont.
 

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Mr. *Duckworth* for the infant heir.

Mr. *Bickersteth* said, that all the cases cited had been fully considered in *Phillips v. Phillips*,<sup>(a)</sup> in which case his Honor decided that real estate purchased with partnership property for partnership purposes was to be considered as personalty, and retained that character as between the real and personal representatives of a deceased partner.

THE MASTER OF THE ROLLS:—It follows from the decision in *Phillips v. Phillips*, that the infant heir is a trustee for the administratrix of the deceased partner, and I think the language of the twelfth section of the act 1 W. IV, c. 60, authorizes the court to direct an immediate conveyance by the infant heir to the purchasers without a petition. Where the court by its decree, declares that the infant heir is a \*trustee, and the right of the party entitled to a conveyance is established by that decree, a petition is unnecessary.<sup>(b)</sup>

(a) 1 Mylne & Keen, 649.

(b) After some conflicting decisions, the rule laid down by Sir John Leach in this case has been followed by the Vice-Chancellor in *Wallon v. Murray*, (6 Sim. 328,) and by the present Master of the Rolls in a recent case of *Miller v. Knight*, (March 9, 23, 1836.) In the latter case the Master of the Rolls before he finally decided the point, conferred with the Lord Chancellor, who concurred in the opinion that, where the court at the hearing declared an infant heir to be a trustee, and established the right of the party entitled to a conveyance, it might, by the same order, direct a conveyance to be made by the infant trustee.

### WAIN v. THE EARL OF EGMONT.

ROLLS.—1834: 21st March.

Where, in a trust deed for the satisfaction of debts, a discretion is vested in the trustees to refuse the benefit of that deed to any creditor, although his claim may be lawful, the court cannot empower the Master to ascertain who are entitled to the benefit of the deed; but if the trustees have no such absolute discretion, no creditor can be entitled to the benefit of the deed, until he has submitted his claim to the investigation and allowance of the trustees, and they have allowed it; or unless upon such application the trustees have refused to act in the execution of the trusts.

THIS was a petition presented by three persons, claiming to be entitled as creditors of the Earl of Egmont, to the benefit of a trust deed executed by the Earl of Egmont; and it prayed that the Master, by whom the claim of one of the petitioners had been disallowed, might be directed to review his report; and that he might proceed and report on the claims of the other petitioners.

By an indenture of release, dated the 2d of November, 1824, and made between John, Earl of Egmont, of the first part, the several scheduled creditors of the Earl of Egmont, for gross sums



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of money or for annuities not secured by judgments, who should execute the indenture, \*of the second part, the [\*446] several creditors for gross sums of money and annuities secured by judgments and other securities, of the third part, Henry Viscount Perceval, the only son of the Earl of Egmont, of the fourth part, the three trustees, of whom Viscount Perceval was one, of the fifth part, and Henry Coward Teed of the sixth part, the Earl of Egmont conveyed the manors, hereditaments and premises therein described to the trustees, their heirs and assigns, upon trust that the trustees and the survivors or survivor, &c., should sell and dispose of the same at their or his discretion, and apply the moneys arising from such sale to the discharge, satisfaction, or composition of the debts and incumbrances due and owing from the Earl of Egmont, according to their several priorities, and in the manner therein mentioned. And it was by the said indenture provided and declared, that no creditors of the Earl of Egmont by judgment, nor any person having a lien or charge upon the said manors, hereditaments, and premises thereby granted and released, should be entitled or allowed to execute the said indenture, until the amount of his debt or claim should be previously allowed, fixed, or ascertained by the trustees or trustee for the time being; and it was provided that it should be lawful for the trustees or trustee to sign and deliver to the several creditors debentures, or certificates of acknowledgment for the amount of their respective debts so allowed, settled, or compounded for; and that every creditor accepting such debenture should sign an agreement according to the form therein specified not to sue or molest the Earl of Egmont; and it was further provided that no creditor of the Earl of Egmont, by specialty or simple contract, nor any person having a legal or equitable charge or lien upon the said manors, hereditaments and premises, should be entitled to any benefit under the said \*indenture, until he should re- [\*447] ceive such debenture and sign such acknowledgment as aforesaid.

The plaintiff was a creditor to the amount of 6,000*l.*, who had obtained a debenture from the trustees; and the bill was filed for the purpose of having the trusts of the deed carried into execution under the direction of the court. By the decree at the hearing, it was referred to the Master to take an account of the mortgage debts and incumbrances charged upon the estates comprised in the indenture of the 2d of November, 1824, and of the debentures granted by the trustees, and of what was due to the plaintiff, and all other the creditors of the Earl of Egmont, entitled to the benefit of the trusts of that indenture.

One of the petitioners, George Dobree, carried in a claim, as a judgment creditor, before the Master; but his claim was disal-

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 1834.—Wain v. The Earl of Egmont.
 

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lowed by the Master, on the ground that it had not been investigated by the trustees, and that, as no debenture had been granted to him by the trustees, he was not entitled to the benefit of the trust deed.

The two other petitioners, being in the same situation in that respect with the petitioner whose claim had been rejected, declined to prosecute their claims before the Master.

Mr. *Bickersteth*, Mr. *Rolfe* and Mr. *Jacob*, for the petitioners, contended that, although the petitioners might not have been entitled to the benefit of the trusts of the deed of the 2d of November, 1824, had the trustees carried the trusts into execution, the situation in which the petitioners stood was entirely altered, because the trustees had, as appeared upon their answer, [\*448] refused to \*execute the trusts of that deed, and had divested themselves of the discretion reposed in them. The petitioners were clearly incumbrancers upon the estate, and as a trust could never fail from the refusal of a trustee to execute it, the court would take care that the trusts of the deed of the 2d of November, were carried into execution, and that the petitioners were not deprived of the benefit to which they were entitled.

Mr. *Pemberton* and Mr. *Girdlestone*, jun., *contra*, insisted that there was no ground for inferring from the answer of the trustees that they refused to act; that the petitioners were excluded, by the express provisions of the trust deed, from the benefit to which creditors who had obtained debentures were entitled; and that the Master was, therefore, right in disallowing their claims. The petition was irregular, for Dobree was the only one of the three petitioners whose claim had been adjudicated upon by the Master, and he should have excepted to the Master's report.

THE MASTER OF THE ROLLS:—If the trustees were authorized by this deed to refuse debentures at their discretion to any lawful creditors, it is plain that this court could never take upon itself the exercise of such a discretion, nor grant power to the Master to ascertain the parties entitled to the benefit of this deed; and if the case were to turn upon that point, it would be necessary to enter into a more minute examination of the language of the deed than it has hitherto undergone. It appears to me, however, that if the trustees have not in the deed that extent of discretion, yet no creditor can be entitled to claim the benefit of the deed, unless his debt has been investigated and allowed by the trustees, or unless the trustees have refused [\*449] to act. It is argued that the trustees in their answer do refuse to execute the trusts, but I do not collect that such is the effect of their answer. They state the circum-

1835.—Glyn v. Soares.

stances which have impeded their progress in the execution of the trusts, but they all express themselves to be ready to act. The court cannot, therefore, in the first instance direct the Master to review his report in respect of the claims of the petitioners.

The petitioners must first submit those claims to the investigation and allowance of the trustees, and, if the trustees refuse to enter into that investigation, they will then be justified in an application to the court; and if, upon such application, it shall appear, upon reference to the trust deed, that the trustees have not an absolute discretion to reject any lawful claim, it will be the duty of the court to authorize the Master to inquire into the debts of the petitioners.

\*SIR RICHARD CARR GLYN, BART., THOMAS HALLIFAX, [\*450]  
RICHARD PLUMPTRE GLYN, CHARLES MILLS, AND  
GEORGE CARR GLYN, AND EDWARD RICHARDSON v. MANOEL  
JOAQUIM SOARES, AND HER MOST FAITHFUL MAJESTY DONNA  
MARIA, QUEEN OF PORTUGAL AND THE ALGARVES.

ROLLS.—1835: 21st and 23d July.

If, in a bill for discovery in aid of the defence to an action, a plaintiff, who is not a party to the record at law, be joined with co-plaintiffs, the defendants in the action, the bill is demurrable.

Certain bills of exchange, the second parts of which were made payable to the order of the treasurer of the royal treasury of Portugal, were accepted by bankers in London, on behalf of a customer who was substantially interested in such bills as one of the subscribers to a loan raised by the government of Portugal under the regency of Don Miguel. After the expulsion of Don Miguel, and the establishment of Donna Maria as Queen of Portugal, the second parts of the bills in question were indorsed by the treasurer of the royal treasury of Portugal, (the same individual who had filled that office at the time when the bills were drawn,) to an agent of the Queen of Portugal, and by that agent were presented for payment to the bankers. The bankers refused payment on the ground that they had reason to doubt whether the indorser was the officer to whose order the bills were meant to be payable, and whether he had any property or interest in the bills; and an action was thereupon brought by the indorsee against the acceptors to recover the amount.

To a bill filed by the bankers, the acceptors, and by the customer on whose behalf they accepted the bills, against the indorsee, and the Queen of Portugal, praying for a discovery in aid of the defence to the action, a commission to examine witnesses abroad, and an injunction, a demurrer was allowed, on the ground of misjoinder of plaintiffs who were defendants in the action, but who had no interest, except as agents, in the subject matter of the suit, with a plaintiff who was no party to the action, but substantially interested in the subject matter of the suit. Whether the bill was not demurrable on the ground of the Queen of Portugal having been improperly made a defendant, *quære?*

THE bill stated that in the year 1833, the five first named plaintiffs carried on in co-partnership together the business of bankers, under the firm of Sir Richard Carr Glyn, Mills, Halli-

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fax & Co., and that from December, 1829, down to and [\*451] throughout the \*first six months of the year 1833, Don Miguel was *de facto* king of Portugal, and exercised by himself and his agents all the functions of government in that country. That in the early part of the year 1833, Don Miguel and his government had occasion to raise a loan of money for the exigencies of the said government, and that such loan was to be raised from such persons as were willing to advance the same upon the security of certain scrip or bonds to be issued by or under the authority of Don Miguel and his government, and that the said government was to engage to pay the holders of such scrip or bonds the sums therein mentioned within a period therein named, and to pay interest thereon half-yearly at the rate therein mentioned; and that in March, 1833, Messrs. Outrequin & Jauge, bankers in Paris, entered into an agreement with Don Miguel and his government for negotiating and raising such loan in Paris, and for remitting the same when raised to the treasurer of the royal treasury of Portugal, appointed by and acting under the authority of Don Miguel and his government, to be applied by such treasurer for the use and service of Don Miguel and his government. That Messrs. Outrequin & Jauge, between the 1st of March and the 30th of June, in the year 1833, subscribed and advanced, and procured to be subscribed and advanced by various other parties in Paris and elsewhere, considerable sums of money by bills of exchange or otherwise, for the use or on account of Don Miguel and his government, upon the security of such scrip or bonds; and that they remitted a great part of the amount so raised and subscribed to the treasurer of the royal treasury of Portugal, appointed by Don Miguel and his government, in bills of exchange, among which were six bills of exchange accepted by the plaintiffs, the bankers.

[\*452] \*The bill proceeded to state that from March, 1833, down to July, 1833, Don Pedro, Duke of Braganza, was engaged in an attempt, by means of foreign auxiliaries, to expel Don Miguel from the throne of Portugal, and to subvert his government, and to establish in his stead Donna Maria da Gloria, afterwards, and at the filing of the bill, Donna Maria the Second, Queen of Portugal. That to resist such attempt Don Miguel had been obliged to incur great and extraordinary expenses, and that the object of the said loan was to furnish Don Miguel with the means of resisting such invasion, and of maintaining his government. That the bills so remitted on account of the said loan were remitted to Joaquim Fernandez Conto, and received by him as the treasurer of the royal treasury of Portugal, appointed by Don Miguel. That Baron D'Est, who then and still was resident at Paris, drew upon the plaintiffs, the bankers, the six several bills therein mentioned for the sums of

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650*l.*, 450*l.*, 550*l.*, 750*l.*, 450*l.*, and 550*l.*, respectively, payable at the times therein mentioned to the order of Messrs. Outrequin & Jauge. That the said Baron D'Est, according to the custom of merchants, made each of the said bills of exchange in two parts; and by the second of such parts respectively required the plaintiffs, the bankers, to pay the amount to Messrs. Outrequin & Jauge, the first parts not being paid. That the first parts of the said bills were remitted by Messrs. Outrequin & Jauge to their agents in London, Messrs. Gower & Co., who received the same, with directions to present the same for acceptance, and to hold the same when accepted, for the holders or indorsees of the second parts. That the first parts of such bills were duly presented and accepted by the plaintiffs, Messrs. Glyn & Co.; but that the plaintiffs, Messrs. Glyn & Co., were not subscribers to the said loan, but that they accepted the \*same [\*453] in the course of their business as bankers, on the account and responsibility, and by the directions of the plaintiff, Edward Richardson, who kept an account with them as bankers, and that they had not any interest in the said bills save as such acceptors; and that in filing this bill of discovery the plaintiffs, the bankers, acted merely as they were advised that as the agents of the plaintiff, Edward Richardson, they were bound to do, and by the directions of Edward Richardson, who, as the party beneficially interested, had the sole management of the action in aid of the defence to which the discovery was sought, and of this suit.

The bill proceeded to state that Messrs. Outrequin & Jauge indorsed each of the second parts of the said bills, as follows: "Pay to the order of the Treasurer-General of the royal treasury of Portugal, value in account of the negotiation of the royal loan of Portugal," and that the bills so indorsed were transmitted to the office of the royal treasury of Portugal, where the same were duly received by the said Joaquin Fernandez Conto, who exercised the functions of treasurer under the authority of Don Miguel and his government; and that Conto never was, and never acted as the treasurer of the royal treasury of Portugal, except under such authority, and that he had no power to apply, dispose of, or negotiate, any of the said bills so remitted, except under the directions of Don Miguel, or his government.

The bill went on to state, that in consequence of the misfortunes which attended the armies and fleet of Don Miguel, and the approach of a hostile army, Don Miguel abandoned Lisbon on the night between the 23d and 24th of July, 1833, and that Donna Maria was proclaimed \*Queen of Portugal, under the title of Donna Maria the Second; and that shortly before the end of July, 1833, Don Pedro and his adherents acting on behalf of Donna Maria, took possession of

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Lisbon, and thereupon assumed and exercised the functions of government on behalf of Donna Maria; but that such government was entirely distinct from, and founded upon the destruction of the government of Don Miguel. That Don Pedro and his adherents seized and took possession of the second parts of the said six bills of exchange, among many other similar bills, which were in the royal treasury at Lisbon, and indorsed the same to the defendant Manoel Joaquim Soares, and such indorsement of each of the said six bills of exchange purported to be signed by Joaquim Fernandez Conto, and such indorsements were dated the 7th of August, 1833, which was after Conto had ceased to be the treasurer of the royal treasury of Portugal on behalf of Don Miguel. That such indorsements were made by Conto, improperly and without authority, and in fraud and violation of the duties which devolved upon him as the agent of Don Miguel entrusted with such securities. That the bonds or scrip issued by Don Miguel and his government were not recognized, or agreed to be recognized by Donna Maria or her government; but, on the contrary, that the loan raised by Don Miguel was declared by Donna Maria and her government to be void, and not binding in the kingdom of Portugal; and that neither Donna Maria, nor any person on her behalf, had given or agreed to give any valuable consideration for the said bills of exchange. That the possession of the second parts of the said six bills of exchange was obtained by Donna Maria, or the persons acting on her behalf, by fraud, accident, or violence, and that they did not, nor did any of them thereby acquire any beneficial interest in, or title to the said bills of exchange.

[\*455] \*The bill proceeded to state, that as soon as Messrs. Outrequin & Jauge discovered that the said bills of exchange had fallen into the hands of Donna Maria, and the persons acting on her behalf, they gave instructions, which were repeated from time to time, to Messrs. Gower & Co., not to deliver up the first parts of the said bills of exchange, and to resist all claims to the said bills, on the part of Donna Maria or her government, or any person claiming title through them.

The bill then stated, that besides the said six bills of exchange, another bill in two parts for 600*l.*, was drawn by Baron d'Est upon the plaintiffs, the bankers, the first part of which bill was remitted to Messrs. Gower & Co., who procured the same to be accepted by the plaintiffs, the bankers, and the second part of which was remitted to Lisbon, where it was indorsed by Conto to Soares, who obtained possession of the first part, and presented the same for payment to the plaintiffs, the bankers. That to such application, Messrs. Glyn & Co. gave the following answer: "This bill being by the indorsement of Messrs. Outrequin & Jauge, made payable not to an individual, but to a public officer,

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whose name does not appear, and circumstances having transpired which give the acceptors reason to doubt, whether the person who has taken upon himself to indorse it, is the person intended by Messrs. Outrequin & Jauge, the acceptors, though ready and willing to pay the amount, require, before doing so, satisfactory evidence of the right of Conto to indorse this bill as the Treasurer-General of Portugal, mentioned in the indorsement of Messrs. Outrequin & Jauge." That, thereupon, Soares instituted proceedings in the Tribunal of Commerce at Paris, against the Baron d'Est and Messrs. Outrequin & Jauge, to recover the amount of the said bills, and also against many other persons to recover the amount \*of similar bills, and [\*456] that the Tribunal of Commerce found that Soares was not a *bona fide* holder of such bills, and gave judgment against him accordingly.

The bill further stated, that Soares, nevertheless, on the 19th of June, 1835, commenced an action against the plaintiffs, the bankers, in the Court of King's Bench, to recover the amount of the said six bills of exchange. That Soares pretended that he was a holder of the said bills for a valuable consideration, and meant to insist in his said action on his right to recover in that character, whereas he was a mere agent of Donna Maria or her government, and had no property or interest in the said bills, or any of them.

The bill proceeded to make a number of charges in support of that allegation; and it prayed for a discovery of the several matters charged, and for a commission or commissions to examine the plaintiffs' witnesses at Lisbon, Paris and elsewhere; and that, in the meantime, the defendants and their agents, and the agents of each of them might be restrained by injunction from continuing or commencing further proceedings at law.

To this bill the defendant Soares put in a demurrer upon three grounds; first, that there was a misjoinder of plaintiffs; secondly, that the matters in respect of which discovery was sought were immaterial to the defence; and thirdly, that the Queen of Portugal was improperly made a defendant.

Mr. Pemberton and Mr. Roupell, in support of the demurrer:—The only plaintiff, who has any actual interest in the subject matter of this suit, is Richardson; and as he is not legally liable to pay these bills of exchange, he is, of course, not a defendant \*in the action which has been brought by Soares [\*457] for the purpose of recovering the amount.

The plaintiffs, Messrs. Glyn & Co., represent that they accepted the bills as the bankers of their customer Richardson, and by his desire and direction, and that they have no interest in the matter, otherwise than as such acceptors on his behalf. The ac-

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tion is brought by Soares as indorsee against Messrs. Glyn & Co., as acceptors, who are liable, as such acceptors, to pay the amount; but it is supposed that the plaintiffs have some right or equity to resist the payment, because, in the interval between the time at which these bills were drawn, and the time at which they were indorsed by the treasurer of the royal treasury of Portugal to Soares, the government of Don Miguel, in whose behalf it is alleged they were drawn, was changed and transferred to that of Donna Maria the Second; and the new government, as it is said, has no interest in, or title to these securities.

This bill is incapable of being sustained, both because the facts alleged in the bill and sought to be discovered, if admitted, would be wholly immaterial as a defence to the action, and because it is irregular in point of pleading. As to the materiality of the facts stated in the bill, there is no allegation that Richardson and Messrs. Glyn & Co., as acceptors of the bills on behalf of Richardson, have not received full value for the amount; and if this be the case, how can the discovery sought by the bill aid the defence at law? What right have they to say that the bills shall not be paid, or that they shall be paid only to Don Miguel or his agents, because, as they allege, Donna Maria or her government is not entitled to the benefit of them? The proper course for the plaintiffs, Messrs. Glyn & Co., was to file a

[458] \*bill of interpleader; but their supposed ground of defence to the action totally fails. Is there any principle in the law of nations upon which it can be maintained, that where money is raised by way of loan on the security of a nation, and the government of that nation is changed, the government *de facto* is not entitled to the benefit of the loan? The loan was raised on the credit of the Portuguese nation, at a time when Don Miguel exercised the functions of government. Donna Maria is now the lawful sovereign of Portugal, and the payment of part of the securities in which the moneys raised for the Portuguese government was invested, is resisted upon the ground that those securities do not belong to Donna Maria, who is the lawful sovereign, but to Don Miguel, who is a mere pretender to the throne of Portugal.

But the bill is demurrable in point of pleading, upon two grounds; not only is the Queen of Portugal, who is not a party to the action in aid of which the discovery is sought, improperly made a defendant, but there is a misjoinder of plaintiffs, Messrs. Glyn & Co. having no interest in the subject matter of the suit, except in their character of acceptors as bankers for their customer, Richardson, but being, as such acceptors, of course the defendants in the action; and their co-plaintiff Richardson, being the party substantially interested, but a stranger to the record



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at law. In *The King of Spain v. Machado*,<sup>(a)</sup> it was decided that where plaintiffs who have no interest in the suit except as agents of their co-plaintiff are joined with a plaintiff who has an interest, a general demurrer to the bill is a good defence. That was a bill for relief, but the principle of the decision is equally applicable to a bill for discovery. If plaintiffs, having no interest, were permitted to be joined \*with plaintiffs having an interest in the matter sought to be discovered, strangers and witnesses might be so multiplied upon the record as, by a succession of abatements arising from marriages and deaths, to occasion great delay and denial of justice to parties seeking the recovery of their legal rights. So far as the action by the holder of these bills against the acceptors is concerned, Richardson is a mere stranger; and a court of equity will not permit a person to file a bill for discovery unless in aid of some proceeding pending or intended, and there must be allegations to that effect; *Cardale v. Watkins*.<sup>(b)</sup> Richardson is not a party to the pending proceeding at law; and it is not alleged, nor can it be alleged that he has any cause of action. It is clear that if Richardson alone had filed a bill for discovery in aid of the defence to the action by the indorsee against the acceptors, in respect of which proceeding he is a perfect stranger, he could not have sustained such a bill; and if he could not have sustained it alone, it is equally clear that he is improperly joined in this bill with the defendants at law. To try whether there is or is not a misjoinder of plaintiffs, put the converse of the case; could Soares, a party to the action, have filed a bill of discovery against Richardson, a stranger to the action, and at most a mere witness? *Fenton v. Hughes*<sup>(c)</sup> is a distinct authority to show that a demurrer would lie to such a bill: and this leads to the other objection, that the Queen of Portugal, who is not a party to the action, and could at most be only a witness, is improperly made a defendant; for, upon the authority just cited, a mere witness cannot be made a defendant to a bill for discovery. With a single exception, which proves the rule, there is no instance in which a person, who is not a party to the action, can be made a party to a bill for an injunction or discovery in aid of the defence to the action. The \*excepted case is where such a bill is [\*460] filed against underwriters, and the owners who are beneficially interested in the result of the action; and that exception is founded upon a special act of Parliament.

Look at the injustice which will be done, if the court should not allow this demurrer. This bill represents that Soares is a mere agent of the Queen of Portugal; Soares is in this country,

<sup>(a)</sup> 4 Russ. 225.<sup>(b)</sup> 5 Mad. 18.<sup>(c)</sup> 7 Ves. 287.

and can put in an answer. But there is no reason to suppose that the Queen of Portugal will put in an answer; and she is evidently made a party, not for the purpose of obtaining a discovery, but for the purpose of effectually preventing all progress in the action.

Mr. *J. Russell contra*.:—It is said that if all the facts stated in the bill were conceded, those facts would constitute no ground of defence to the action at law, and that, therefore, this demurrer must be allowed. The facts stated in the bill are the foundation of the judgment of the Tribunal of Commerce at Paris, by which judgment it was declared that Soares has no title to the bills of exchange which he is, in this country, seeking to recover. It is alleged, and not denied, that the possession of the bills was obtained by fraud or violence; that the person by whom the bills purport to be indorsed to Soares did not indorse them, or, if he indorsed them, did so in fraud of his trust, or under duress; that Soares, and the government whose agent he is, never gave any consideration for the bills, and that Soares is, in fact, a fraudulent holder of the bills, the amount of which he seeks to recover; and yet it is contended that these facts, though they be all admitted, are immaterial to the defence of the plaintiffs at law.

Whether the case alleged by the bill, and established by [\*461] the decision of the Tribunal of Commerce \*at Paris, will or will not constitute a good defence to the action, is a question which the court will not determine upon demurrer. It has been decided that where the bill is for a discovery leading to relief at law, the defendant cannot plead in bar to the discovery what will be a bar to the relief at law: *Hindman v. Taylor*. (a) Lord Redesdale lays down the true rule as to this point in his *Treatise on Pleadings*. (b) "If it can be supposed that the discovery may in any way be material to the plaintiff in the support or defence of any suit, the defendant will be compelled to make it." And he illustrates that rule by the case of the *Bishop of London v. Fytche*, where the bishop filed a bill against the patron of a living, and a clerk presented by him, to discover whether the clerk had given a bond of resignation, and the patron demurred on the ground that the discovery was either such as might subject him to penalties, or was immaterial to the plaintiff; and the demurrer was overruled, the court being of opinion that the bond was not simoniacal, but conceiving that the discovery might be material to support a defence to a *quare impedit* upon this ground, that the bond put the clerk under the power of the patron in derogation of the rights of the ordinary. The opinion which the court entertained in that case as to the validity

(a) 2 Bro. C. C. 1.

(b) Page 193, 4th edit.

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of the bond, was afterwards determined by the House of Lords to be erroneous; but that circumstance does not affect the principle upon which the demurrer was overruled. The bond was taken not to be illegal, and upon that supposition Lord Thurlow, in delivering judgment, observes that "it is not too much to say that where a man comes for the discovery of evidence material to his defence, the defendant shall not protect himself against the discovery." And he adds, that, "whether the discovery \*was material or not, was chiefly for the plaintiff who [\*462] paid the costs to judge:" *Bishop of London v. Fytche*.(a)

As to the objection that Donna Maria, the Second, is improperly made a defendant to the suit, because she is not a party to the action, the answer to that objection is, that a court of equity will consider who is the substantial party in the action at law. Soares has no beneficial interest; he is the mere agent of the government of Donna Maria, and the Queen of Portugal is substantially the party who seeks the recovery of the amount of these bills, though she cannot claim it in a court of law. The practice in insurance cases, where the parties beneficially interested are constantly joined with the underwriters in suits in equity, shows that the supposed uniform or general rule which is contended for on the other side, is subject to modification according to circumstances; nor does the practice in those cases constitute, as was argued, the only exception. What is more common than to join the assignor with the assignee of a bond, or other instrument, the party having the legal with the party who has the equitable interest?

The other objection in point of form is, that there is a misjoinder of plaintiffs, who have no interest with a plaintiff, who has an interest in the subject matter of the suit. The rule laid down by Lord Redesdale(b) is, that "interest in the subject of the suit, or a right to the thing demanded, and proper title to constitute a suit concerning it, are essentially necessary to sustain a bill; and that if they are not fully shown by the bill itself, the defendant may demur." The question is, therefore, whether the interest of all the plaintiffs is not fully \*shown by [\*463] the bill. The plaintiffs, Messrs. Glyn & Co., are necessarily, from the form and nature of the action, the only defendants at law; Mr. Richardson is shown by the bill to be the party substantially interested in the result of the action; and the bankers state upon the bill, that they have no actual interest in the subject matter of the action, but that Richardson is the party substantially interested. This allegation is admitted; it is admitted that Richardson alone is interested in the result of the action, and that the money, if recovered, is to be paid out of his

(a) 1 Bro. C. C. 96.

(b) Tr. on Pl. p. 154, 4th edit.

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funds. How, then, can the *King of Spain v. Machado* apply to this case? There the co-plaintiff objected to, was objected to on the ground that he had no interest; here the objection is, that the co-plaintiff said to be improperly joined with the plaintiffs, who are necessary parties to the action, is the person most interested in the result of the action. In insurance cases it is the constant practice to join the broker as a co-plaintiff with the party beneficially interested. Again, where a bill is filed to restrain a purchaser from seeking by action to recover the deposit, the vendor and the auctioneer, that is to say, the person substantially interested and the agent, are properly made co-plaintiffs. It is not inconsistent, therefore, with the practice of the court, and it is certainly just and equitable, that the *cestui que trust* should be brought before the court in a suit seeking discovery in aid of the defence to an action brought against the trustees. Suppose Messrs. Glyn & Co. refused to defend the action brought against Richardson, or compromised the rights of their *cestui que trust*, could it be contended that this court would refuse to interfere, and that Richardson could obtain no relief? It is said that Soares could not file a bill of discovery against Richardson, and that, therefore, Richardson could not alone file a bill of discovery in this court, and, if he could not alone file a bill, he is [\*464] \*improperly joined with the co-plaintiffs. It is true that *Fenton v. Hughes* has decided that a bill of discovery cannot be filed against a mere witness; but it is assumed in the argument that Richardson is a mere witness. In *Cholmondeley v. Clinton*,<sup>(a)</sup> the rights of the persons improperly joined as co-plaintiffs, namely, the heir at law and devisee, were perfectly inconsistent. Here there is no inconsistency between the rights of the plaintiffs, who are the necessary parties in the action at law, and of the plaintiff who is the party substantially interested; nor can any inconvenience result from the joinder of these plaintiffs. The plaintiffs must pay the costs as soon as the answers of the defendants are put in; and as to the arguments founded upon the inconvenience arising from a multiplicity of abatements by deaths and marriages, they are plainly inapplicable in the present case.

Mr. Pemberton in reply:—It is not denied that Richardson, and the bankers who have accepted the bills on his behalf, have received full value for them, and the only pretence the plaintiffs have for resisting payment, is the right which they have assumed to themselves, of considering whether the person who is now recognized as the lawful Queen of Portugal, or another person who formerly usurped her rights, has the better pretensions to the throne of Portugal, as if that question were in the slightest

(a) 1 T. &amp; Russ. 107.

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degree material to the determination of the issue between the holder and the acceptors of these bills of exchange. The bills are indorsed by the person to whose order they are made payable; and if all the statements in the bill, respecting the contest for the throne of Portugal between Don \*Miguel [\*465] and Donna Maria, and the succession of the one government to the other, be admitted, they cannot in the least degree affect the determination of a question which must depend upon the same principles which govern every similar mercantile transaction. *Hindman v. Taylor* is a case of which the authority is doubtful, and applies only to a plea; not to a demurrer. Lord Redesdale, in a note to the passage cited from his treatise, expresses a doubt as to the soundness of Lord Thurlow's decision in *Fytche v. The Bishop of London*. The cases of *Cuff v. Platell*,<sup>(a)</sup> *Makepeace v. Haythorne*,<sup>(b)</sup> and *The King of Spain v. Machado*,<sup>(c)</sup> have established that a plaintiff who has no interest cannot be joined with a plaintiff who has an interest in the subject matter of the suit, and the cases which constitute a real or apparent exception to the rule, are cases which have either no application to the present case, or which would not be followed since the more recent decisions.

*July 23d.*—THE MASTER OF THE ROLLS:<sup>(d)</sup>—This is a bill which professes to have for its object a discovery and commission for the purpose of meeting an action brought by the party claiming to be the holder of certain bills of exchange against Messrs. Glyn & Co., who are the acceptors of those bills. In so far as the parties to the record at law are concerned, this is an ordinary mercantile transaction. It is stated that Messrs. Outrequin & Jauge having a certain sum of money, which they were desirous of remitting to the government of Portugal—for what purpose, or how the money came into their hands, I abstain at present from \*considering—adopt this course for doing so. [\*466] They procure six bills, drawn by a Baron D'Est on Messrs. Glyn & Co., which are each in two parts: one part is sent to England for the purpose of being accepted, and it is accepted by Messrs. Glyn & Co., in the ordinary course, and retained by the agent of Messrs. Outrequin & Jauge, to whom it was remitted; the other part is sent to Lisbon and made payable to the order of the Treasurer-General of the royal treasury of Portugal, value in account for the negotiation of the royal loan of Portugal. The second parts of the bills in question are afterwards remitted to this country, purporting to be indorsed by the Treasurer-General of the royal treasury of Portugal to Soares,

<sup>(a)</sup> 4 Russ. 242.<sup>(b)</sup> Ibid. 244.<sup>(c)</sup> Ibid. 225.<sup>(d)</sup> Sir C. Pepys.

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who is the plaintiff at law, claiming to hold by virtue of the title derived under this indorsement.

As between the holder and the acceptors of the bills, therefore, the matter in contest is whether the party holding the bills, is or is not the person who derived title under the individual or the officer to whose order the bills were made payable. The acceptors have an undoubted right to have that fact ascertained, because upon the affirmative of that fact depends their authority to pay the bills which they have accepted; and if they should pay the bills to persons not authorized to receive the money, they would not be entitled, as against those whose money they are supposed to have in hand, to say they had discharged all obligation that attached to them in respect of those bills. They are, therefore, of course, entitled to have that fact investigated, but beyond that they have no interest whatever in the subject matter. It cannot be material to them how Messrs. Outrequin & Jauge had the money in their hands; why it was they wished to remit it to Portugal; and least of all, can it be material to the parties, the acceptors \*of the bills, whether the person who seeks to recover the money on those bills, if he shall get it into his hands, means to apply it to one purpose or another. The sole question is, whether he is the party legally authorized to receive the money, and invested with the authority of those parties to whose order the money was made payable. And it does appear, upon the statement of this bill, that the acceptors are fully aware of the situation in which they stand, because, from a feeling creditable to themselves as merchants and bankers, they are anxious in this bill to disclaim, as far as they can, any interest in the subject matter of the suit, and to withdraw themselves from the situation of refusing to pay bills which they have regularly accepted. They say they have no interest in the subject matter; but that Mr. Richardson, who is a customer of theirs, and who keeps money with them, having desired them to accept those bills, they accepted them for him, and therefore, that the subject of this suit is a matter of perfect indifference to them; and they evidently show, as far as the statement in the bill will enable them to do so, a disposition to withdraw from the contest raised by this suit. This is not a bill for the purpose of administering equities between the parties; it is not a bill in which the question who is entitled to the money can be discussed; it is merely a bill to aid the defence to an action at law, and it cannot correctly or properly raise any question which is not material for that purpose.

This bill has been met by a demurrer raising three questions. The first point raised by the demurrer is that Mr. Richardson is improperly made a plaintiff; secondly, it is said that the matter sought to be discovered would not be material for the defence of

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the action at law ; and thirdly, that the present Queen of Portugal has been improperly made a defendant.

\*I find quite sufficient ground for allowing this de- [\*468] murrer on the first point raised ; and I shall only so far observe on the two latter points as to show the reason why, if an application should be made by the plaintiffs for liberty to amend their bill, I shall think it my duty to refuse it.

The making the present Queen of Portugal a defendant, cannot possibly be correct in any view consistent with the object for which this bill professes to be filed. It cannot be material for the purpose of a defence at law ; it can only be material in the event of the suit being so constituted as to raise a question as to the equities between the parties. Whether she has been made a defendant from mistake, or with the hope of deriving an advantage from the utter impossibility of any answer being obtained from the Queen of Portugal, is a question upon which I feel it unnecessary to make any observation beyond this, that all the statements in the bill about the contest for the throne and crown of Portugal, must be, in any view of the case, wholly immaterial. The courts of this country know nothing of the contests of foreign powers, as to who is or who is not to be sovereign of a foreign state ; the courts only know those who are from time to time recognized by this country as sovereigns. With regard to the crown of Portugal, the recognized acts of this country are, in the first place, the acknowledgment of the individual named on this record, Don Miguel, as Regent of Portugal during the present queen's minority ; and the recognition of the present Queen of Portugal as sovereign. There has been no recognition in this country, nor is it so stated in this bill, of the individual Don Miguel as sovereign of Portugal, and yet the whole equity attempted to be raised on the bill is, as to whether Don \*Miguel is or is not to be considered the sovereign of [\*469] Portugal.

It is impossible to suppose that it could ever be maintained, in an action upon a bill of exchange by the holder against the acceptor, that the title to the crown of a foreign state was matter to be put in issue, and to be submitted to the consideration of a jury. All the statements on the face of this bill are utterly immaterial with reference to the only matter at issue in the action. It is a case, therefore, in which one cannot but suspect that some irregular and collateral advantage was expected to be derived from making the Queen of Portugal a party to this record. But it is quite another question whether a defendant could take advantage of that by demurrer. It is not necessary that I should express any opinion upon that point ; but, undoubtedly, it may be an important consideration on the question of pleading, whether advantage by way of demurrer could be taken of a per-



1835.—Glyn v. Soares.

son having, under such circumstances, been improperly made a defendant; or whether, in another stage of the cause in which the question would arise, the plaintiff could obtain any advantage by having improperly made a party defendant to a bill of discovery. That might be important at some future stage of the cause, where the question might arise how far the injunction ought or ought not to be continued, until the answer of the defendant should be brought in. I purpose, however, to decide this case entirely upon the first objection.

The sole parties to the action are, of course, the holder and acceptors of the bill; but Messrs. Glyn & Co., the plaintiffs upon this record, are not those who are sought to be directly [\*470] affected one way or the other \*by the result of the action. They have, in reality, no interest in the action at law; no property in the subject matter out of which these bill transactions arise; they are merely acceptors for another person whose money they have got in their hands, and they, therefore, throw the whole burden of the litigation upon Mr. Richardson.

Now the holder of these bills is utterly and entirely a stranger to Mr. Richardson; there is no contract bringing the holder and Mr. Richardson into any kind of connection. Whether Mr. Richardson has or has not desired the bankers to accept these bills, or whether he has or has not undertaken to indemnify the bankers, is a fact with which the holder of the bills has nothing whatever to do, and it would be a strange course for a court of equity to pursue, where there is no question or contest between the holder and the acceptor of a bill of exchange, to permit a party to come into a court of equity for the purpose of obtaining discovery, who, upon the face of the bill states that he has no interest in the matter. It is quite sufficient to refer to those cases which are now indisputably the law of the court, and which establish, that if a person who has no right to sue by himself, and who is a perfect stranger as between himself and the defendant, is joined with those who have a right to sue, that is matter of objection to the suit, not only upon plea or demurrer, as the matter may be raised, but even at the hearing of the cause. If Mr. Richardson has no right to come here as plaintiff, if he has no right to seek for the discovery which is sought, then it is quite clear, whatever ground the acceptors, if they had come in their own right, might have had to ask for the discovery, they cannot have that discovery under the present circumstances. Mr. Richardson has nothing whatever to do with the case; he is under

no legal obligation, he is not sought to be affected by [\*471] the proceedings \*at law, and the true way of trying his right to come here, is to suppose he came here individually and alone. If he were to come here individually and alone, and were to say, "This is my money; I have undertaken to in-



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demnify the bankers, and they will not make the defence, if I do not; they will not file a bill of discovery, which they ought to do, if I do not take that step; and, therefore, I come here to raise a question as between the holder and acceptors of the bill of exchange, upon matters which the parties at law do not think proper to litigate in this court;" it is clear that such a bill could not be sustained, and that Mr. Richardson would not have a right to introduce himself into a contest between parties who are in litigation respecting a legal contract, and to ask for the interposition of this court, because he alleges, for some reason or other, some transactions between himself and the defendants at law; that he has some interest, not connected with the other litigating parties, or arising out of any contract with them, but that the only interest he has in the subject matter in contest is merely a personal liability to pay. This case, therefore, is totally distinct from those cases which were alluded to in the argument, in which persons are permitted to come to this court and obtain an injunction as between co-defendants; as, for instance, the case of a vendor who comes to this court for an injunction where the purchaser is bringing an action against the auctioneer for the deposit. There the vendor may insist on the purchase money remaining in deposit where it was placed; for he has an interest in the subject matter in contest, and is seeking to protect that, which he has a right to allege is his own. Here the supposed interest of Mr. Richardson amounts to a mere personal liability, and the performance of a personal contract.

\*I am clearly of opinion, therefore, that Mr. Richardson [\*472] has no right to appear here as a co-plaintiff with the bankers, who might, as to part of the discovery sought—though I give no opinion upon that—be entitled to ask for an investigation of some of the facts stated in the bill. As the bankers have associated themselves with a person who has no right to sue, the demurrer must be allowed; and, for the reasons which I have stated, I shall not give any leave to amend the bill.

#### WHARTON v. THE EARL OF DURHAM.

1834: 29th and 30th July, and 5th August.

W. bequeathed 5,000*l.* to the daughter of his brother J., charged on his real estates, and authorized the interest to be raised for her maintenance, if J. should so direct; and he devised his real estates, so charged, to J. in fee. J. bequeathed 10,000*l.* in trust for his daughter for life, and after her death in trust for her children, and declared that that sum should be in addition to the sum to which she was entitled under W.'s will. The daughter afterwards married. Her father advanced to her husband 15,000*l.* as her marriage portion, and, by the settlement, pin money, and a jointure for the wife, and portions for the younger children of the marriage, were provided out of the husband's property and the 15,000*l.* were

1834.—Wharton v. Earl of Durham.

declared to be in satisfaction of the sums to which the wife was entitled under W.'s will: Held, (affirming the decision of the Vice-Chancellor,) that the 10,000*l.* legacy was not adeemed by the marriage portion.

THE several instruments, upon the effect of which the question in this cause arose, together with the circumstances and manner in which the case came before the court, are fully stated in Mr. Simons' Reports, Vol. V, p. 297.

The Vice-Chancellor having, by his decree, dated the 21st of November, 1832, among other things, declared that the plaintiffs, John Wharton and Susan Mary Ann, his wife, in her right, and the plaintiff, John Wharton, as the administrator of Susan Wharton, deceased, and the defendant, Thomas Barrett Lennard, as the administrator of his late wife, Margaret Lennard, [\*473] deceased, \*were, by virtue of the will of the testator, General John Lambton, entitled to have the sum of 10,000*l.*, with interest, at 4 per cent. from the time of the testator's death, raised out of his freehold, copyhold and personal estates, the defendant, the Earl of Durham, presented a petition of appeal against that decree.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Pole*, for Mr. and Mrs. Wharton, in support of the decree.

Mr. *Rolfe* and Mr. *Lloyd* for Mr. Barrett Lennard.

The *Solicitor-General*, Sir *W. Horne* and Mr. *Stephenson* for the appellant, the Earl of Durham.

With respect to the questions arising upon the construction of the instruments, and upon the point of law, the counsel on both sides followed the same general line of argument, and relied upon the same authorities respectively, as in the court below. The following additional cases were referred to: *Shudal v. Jekyll*, (a) *Thomas v. Kemeys*, (b) *Hartop v. Whitmore*. (c)

It was also made a matter of considerable controversy how far, under the circumstances, Mr. and Mrs. Wharton were proved, or could be considered, to have been ignorant of the nature and contents of General Lambton's will; and how far, if notice was to be presumed, their acquiescence for so many years precluded them from now prosecuting their claim with success. Upon the subject of their alleged ignorance, the only positive evidence was to be found in the testimony of Mr. Ralph John Lambton, who was examined as a \*witness on behalf of the plaintiffs, and who deposed, that in the month of March, [\*474]

(a) 2 Atk. 516.

(b) 2 Vern. 348.

(c) 1 P. Wms. 681.

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1834.—Wharton v. Earl of Durham.

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1794, very shortly after General Lambton's decease, his will was read over, in the presence of some of the domestics, to several members of his family, then residing at Lambton Hall, among whom were the deponent, his late brother William Henry Lambton, and his sister Jane Dorothy Lambton; but neither of the plaintiffs was present on that occasion. He further deposed, that in the month of October, 1826, while the plaintiffs were staying with him on a visit, Mr. Ward, the solicitor of the defendant, Lord Durham, called upon the deponent at his residence, and saw both the plaintiffs; that at such meeting Mr. Ward, in the deponent's presence, had some conversation with, and addressed the plaintiff, Mrs. Wharton, respecting a legacy of 10,000*l.* which had been left her by her father, and that such conversation took place, to the best of his recollection, in the presence also of the plaintiff, her husband; that Mr. Ward asked Mrs. Wharton if she had given any release for the legacy, and that she thereupon replied that she never till then had heard of any such legacy having been left to her, but that she would have her claim investigated, and that she thought it was very likely that such a legacy might have been left to her, as she considered herself to have been a favorite child of her father.

*August 5th.*—THE LORD CHANCELLOR:—The question in this case, which was decided by the Vice-Chancellor, and is now brought here by appeal, is whether or not a provision of 15,000*l.* made for Susan Mary Ann Lambton by her father, General John Lambton, on her marriage with John Wharton, of Skelton Castle, in the year 1790, was to operate by way of ademption \*of a legacy of 10,000*l.* left to her by the general [\*475] in his will executed in the year 1788. And first of all, as the general died in the year 1794, and the bill was only filed in the year 1829, the length of time that elapsed without any claim demands consideration. It is a matter to which I always feel bound to pay the closest attention, and, if unexplained, it will almost always, with me, prove decisive.

Mr. and Mrs. Wharton were living during all that period of thirty-five years in habits of more or less intimacy with the general's family, that family comprising among its members, William Henry Lambton, Lord Durham's father, down to the year 1797, and during the whole period, Ralph John Lambton, who, upon the death of William Henry Lambton, his elder brother, and the sole executor of the general's will, became the testator's legal personal representative. Mr. Wharton was in embarrassed circumstances during almost the whole of that time, and it certainly does seem very extraordinary that the knowledge of the legacy in General Lambton's will should never have reached Mr. or Mrs. Wharton.

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1834.—Wharton v. Earl of Durham.

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Nevertheless, I am bound to proceed on the evidence in the cause, and whatever the improbability may be of the ignorance alleged by Mr. and Mrs. Wharton, three facts are before me, all of which are extremely important in determining the question of their cognizance.

First, Ralph John Lambton, who was the executor of his brother's will, and, of course in that character the personal representative of his father also, was the person who naturally would have made the communication to them. After the year 1797, when his brother died, he might be regarded as [\*476] the head of the family. But he \*has been examined as a witness, and he cannot say that any such communication was made; moreover the defendant has not examined him at all to this matter. Now the negative, the ignorance, is not easily proved; but if there had been a communication this might well have been shown. Indeed, I attach much weight to the argument urged for the respondent, that a communication of the fact that a legacy had been left would naturally have led to a consultation upon the point of law, and consequently that the knowledge of such communication would have been better procured, and the proof of it more easily made than in an ordinary case of the communication of any fact not leading to legal consultation.

Secondly, upon Lord Eldon becoming the purchaser of an estate on which the legacy, unless adeemed, was a charge, he required a release or an indemnity, justly regarding the question of ademption or not, as far too nice even for him to decide without any security. Upon this, application was made by Lord Durham's solicitor to Mrs. Wharton in the presence of Ralph John Lambton and of her husband. The request was, that she should release her legacy under the general's will. Her answer, as stated by Mr. Ralph John Lambton in his evidence, was, that she never before had heard of any legacy given to her by her father's will. This circumstance is very material. It is clearly admissible in evidence as the declaration made by a party in answer to an application from the opposite party, and it was made in the presence not only of that party's solicitor, but of the personal representative of the testator himself. To this Mr. Ralph John Lambton, the executor gives no contradiction whatever, and he has not been cross-examined by the appellant.

[\*477] \*Thirdly, not only does the defendant not cross-examine Mr. Ralph John Lambton, but he does not avail himself of the evidence of Mr. or Mrs. Wharton, which he might have done by means of a cross bill. It is impossible, therefore, to allow any force to an observation that, though Mrs. Wharton might know nothing of the general's will, yet Mr. Wharton must have known something. The defendant has elected not to trust

Mr. Wharton's oath, and therefore cannot be heard to urge such a possibility.

Upon the whole, I think the court is bound judicially to consider that the knowledge of the legacy is not<sup>a</sup> brought home to Mr. or Mrs. Wharton. Indeed, the proof of ignorance, with a view to the argument arising from lapse of time, lies more upon the plaintiffs than upon the defendant Lord Durham, and I think that the evidence on this point preponderates decidedly in their favor; that is to say, that the case stands before the court on the fact of Mr. and Mrs. Wharton not having known of the legacy before Mr. Ward made the communication in Mr. Ralph John Lambton's presence.

The question, therefore, which alone remains for the court to decide is, whether or not the legacy was adeemed by the settlement.

I shall not go through the other branches of the argument, on which I think the preponderance is, upon the whole, in favor of the plaintiffs. But one argument, if sound, appeared to be decisive, and sufficient of itself to support the judgment below. The settlement expressly gives the 15,000*l.* as intended to cover the legacy left by the will of the general's brother in 1772, and it says nothing whatever of the legacy in the general's own will. Hence, say the plaintiffs, it is impossible to hold that \*the general, having expressed this settlement to be in [\*478] ademption of one thing, can be intended to have meant that it should be in ademption of another also. Nor can any authority of any kind be shown which proves the affirmative of such a proposition. To this it was most ingeniously and powerfully urged for the appellant, that the reason for expressing the satisfaction of the uncle's legacy was obvious, for unless adeemed expressly, the law would not have worked any ademption or satisfaction; whereas the law, without any expressed intention, was sufficient to operate the ademption of the legacy proceeding from the general himself, the maker of the will as well as of the settlement; and to this argument I was at first disposed to listen with much favor. Had further consideration induced me to think it sound and decisive, I should then have felt it incumbent on me to examine the other points of the respondents' case more rigorously, though in that event I have little doubt that I should have arrived at the same conclusion; for they appear to me sufficient to support the decree. But no such scrutiny is necessary, for I am clearly of opinion that the appellant's argument is not sufficient to displace this, the main foundation of the judgment below.

That the presumption of law is against double portions no one questions, any more than that the rule is founded on good sense. For the parent, being only bound by a duty of imperfect obligation to make provision for the child, and being the sole judge

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what that provision shall be, must, generally speaking, be supposed, when he makes a second arrangement by settlement or otherwise, to put it in the stead of a former one made by will, and not to do that twice over which no law could compel [\*479] him to do once. \*Nevertheless, as has oftentimes happened with legal principles, there has been a tendency to push the presumption once established beyond the bounds which the principles it was founded upon would reasonably warrant, and because the doctrine was sound that a second provision should be taken as substitutionary for a former one, it seems to have been almost concluded that it never could be accumulative. At least, the leaning of the courts has frequently gone so far as to make violent presumptions against the conclusions to be plainly drawn from facts indicating an intention which excluded the general supposition of ademption; and observations have been more than once made in this place indicating the opinion of the court, that the principle had been pressed quite far enough, and ought to receive no more extension. The rule, then, as it now stands, must be taken to be this;—the second provision will be held to adeem the first—say the marriage portion to adeem the legacy—unless, from the circumstances of the case, an intention appears that the child or other person towards whom the testator has placed himself *in loco parentis* shall take both; and there is to be no leaning, still less any straining, against inferring such an intention from circumstances, any more in this than in any other case.

It is equally certain, and flows equally from the same principles, that we are not to weigh in golden scales the provisions made, and to determine against ademption merely because the two differ in amount or even in kind. A difference of amount has never been held sufficient proof of accumulation, and it has been distinctly held, that the circumstance of the sums being payable at different times, and other differences, so they be slight, say the books, will not countervail the general presumption of an intention to adeem. The cases of *Ex parte Pye* and [\*480] \**Ex parte Dubost*, (a) before Lord Eldon, *Hartopp v. Hartopp*, (b) before Sir William Grant, and the discussion of the question raised on Sir Joseph Jekyll's will in favor of his niece (c) sufficiently illustrate this proposition. Nevertheless no case has gone so far as to show that a difference, such as the one in this case, will have no effect upon the application of the principle; a difference no less than this, that the one portion would have gone to the issue of any marriage contracted by the child, while the other was confined to the offspring of a single bed. On the contrary, the cases, especially *Roome v. Roome*, (d) *Baugh v.*

(a) 18 Ves. 140.

(b) 17 Ves. 184.

(c) *Shudal v. Jekyll*, 2 Atk. 516.

(d) 3 Atk. 181.



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*Read*, (a) and *Spinks v. Robins* (b) show that differences not greater than this, perhaps less considerable, will suffice to exclude ademption; and one of those cases, (*Baugh v. Read*), though ill reported, shows the impossibility of extending the principle of ademption to a legacy where the provision subsequently made was expressed to be in satisfaction of a different claim. The child was entitled to 1,800*l.* under her grandfather's will, and her father had left her a legacy of 8,000*l.* By her settlement the husband covenanted to release the claim to her legacy of 1,800*l.*, in consideration of 5,000*l.* portion given by the father, which was expressed to be in satisfaction of the grandfather's legacy. It is to be observed that the question raised there was not whether this should operate as a total ademption of the 8,000*l.* legacy given by the father's will, but only *pro tanto*. However, the court held it not even to be *pro tanto* an ademption; and yet, after satisfying the 1,800*l.* of the grandfather's will, there remained upwards of 3,000*l.* over to go in ademption of the father's legacy.

\*Let us now consider what is the intention manifested [\*481] upon this settlement and will taken together, and, admitting that the proof lies on the party denying ademption, let us see whether or not he can rebut it by reference to circumstances indicative of a contrary intent.

The will of General Lambton distinctly gives Mrs. Wharton 10,000*l.*, with a statement that it is to be over and above the sum of 5,000*l.* bequeathed by his elder brother William, and charged on the estate which descended from that brother to the general. The settlement states that the 15,000*l.* is in full satisfaction and discharge, not of 5,000*l.* or any other sum specified, but of all and every the sum and sums of money which Mrs. Wharton may be entitled to or may claim under William Lambton's will. This change of expression is by no means immaterial, for it shows that the general intended the settlement as a discharge of whatever Mrs. Wharton could claim under the will for his elder brother, and, therefore, covers all claim of interest due, as well as the 5,000*l.* principal. Now the chief argument for ademption, as regards intention, and independently of the rule of law, arises from the circumstance that the residue of the money settled, after satisfying the legacy left by William Lambton, amounted to the sum bequeathed by the will of the general himself. But the sums no longer tally; at any rate not in the general's view of the matter, for he does not speak of 5,000*l.*, but of a different and manifestly of a larger sum, the generality of the description in the settlement having no other possible meaning than to cover something beyond 5,000*l.*, as it could not by any possibility mean anything less.

(a) 3 Bro. C. C. 192; *S. C.*, 1 Ves. jun. 257.

(b) 2 Atk. 491.

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[\*482] \*But there is another consideration not to be got over. The general expressly excludes the sum due, not from himself, but from the estate under his brother's will, and declares that the provision by the settlement shall be in satisfaction of this sum, and he excludes nothing more. His attention is directed to the question whether what he is putting in settlement shall or shall not be in ademption of any other claims; in other words, how far it shall be an ademption, how far it shall be substitutionary, and how far accumulative. And he says, it shall adeem or rather satisfy all claims under the will of William; it shall to that extent be substitutionary. Is not this a token that he meant it should beyond this be not ademption, not substitution, but addition or accumulation?

It is to be observed that he does not say a portion of the 15,000*l.* is to satisfy his brother's bequest, or rather discharge the estates descended from him of the burden lying on them. He says the sum settled is to be in satisfaction of the sum charged. It is not only a straining of the sense to assume that he further intended it to adeem the bequests in his own will, but it seems much more natural to infer that he intended it should not. When a man says, "I give you 15,000*l.*, but this shall be in lieu of the debt which my estate owes you under my brother's will," and says no more, we are entitled to conclude that he does not mean to say that the same sum shall be also in lieu of the legacy in his own will, but rather that his meaning is, "I hereby with 15,000*l.* satisfy my brother's bequest, but I leave my own to stand upon its separate ground."

That the testator lived four years after the settlement, and never altered his will, may be stated as an additional argument, for certainly nothing could have been so \*easy; yet on this little reliance can be placed, both because this circumstance is of necessity common to all questions of ademption, and because, if the testator believed he had adeemed the legacy by the second provision, he would not think of cancelling the first.

In addition, however, to the arguments arising from the expression of one intention, and the testator's silence as to another, and to which I have referred, the authority of the cases is to be reckoned of much account. No instance can be adduced of the second provision being held by implication to adeem one interest, when there is an express statement that it should be taken in satisfaction of another; and the case of *Bough v. Read* is plain and conclusive the other way.

I can, therefore, see no reason to question the propriety of the decision of the court below. But, before I conclude, it is fit that I should express my dissent from all the observations which have been made in disparagement of the conduct of either party.



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1834.—Wharton v. Earl of Durham.

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Lord Durham and the rest of his family can in no way be blamed for concealment of any kind. The probability is that they never supposed Mrs. Wharton could be ignorant of the general, her father's, will. She happened to be confined at the time of his decease, and by reason of that circumstance was not present when the will was read; the subject had in all likelihood never been mentioned among the family afterwards; and the impression of Lord Durham and his uncle, and his professional advisers, must assuredly have been that Mrs. Wharton took the provision made for her by the settlement instead of the legacy, and with full knowledge of the latter. That his Lordship and those about him, therefore, stand perfectly above all reproach in this affair is quite undeniable \*upon the facts of the case, as [\*484] it is assuredly clear to the minds of all those who are acquainted with the parties.

But it is just as certain that no blame whatever can be cast upon Mr. Wharton and his wife. Anything more incorrect I have never known, than the view of their conduct which affects to charge them with making an unconscionable demand. Attempts have been hazarded to treat this like the case of persons seeking to be paid over again what they had once before received. Never was anything more unjust, never was anything more founded in gross ignorance. The accusation indeed is altogether absurd. This is a mere question of construction, and is, therefore, either a point of law, or, if a matter of fact, it turns upon what was the intention of the party. In either case the question is, whether or not Mrs. Wharton was by law entitled to the sum in dispute over and above what the settlement gave her. But in the light most favorable to the charge, that which treats this as a question of fact, that is of intention, she can only prevail by showing that her father intended she should take both sums. Can anything then be more ridiculous than to charge her with unfairness for seeking to have her father's intentions in her favor fulfilled?

The decree below must be affirmed, and with costs.

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1836: *May*.—This case has since been carried by appeal to the House of Lords, where it has been fully heard, and now waits for judgment.



# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY.

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\*HENCHMAN *v.* THE ATTORNEY-GENERAL. [\*485]

1829: 26th May. 1830: 24th May. 1834: 23d May and 5th August.

Devise of copyhold land in fee upon condition that the devisee, within one month, pay 2,000*l.* to the testator's executor, to be applied, after payment of debts and legacies, to charitable purposes.

The testator died without leaving any customary heir or next of kin.

Held, upon appeal, that the proportion of the 2,000*l.*, which was void by the mortmain act, was to be considered as real estate undisposed of, and that the devisee, and not the crown, was entitled to it.

JOHN GIRLING, by his will dated the 1st of April, 1793, devised certain copyhold lands to William Henchman, (whom he appointed one of his executors,) his heirs and assigns, upon condition that he, William Henchman, his heirs and assigns, should pay to Martin Harsant, (whom he appointed his other executor,) his executors or administrators, the sum of 2,000*l.*, and he desired that the same should be taken as part of his personal estate and disposed of in the same manner as was thereafter mentioned in case the same premises should be sold. But if William Henchman should, for the space of one month after his decease, refuse and decline to have and take the same premises

\*under the said devise, then, from and after such refusal, [\*486] he revoked the said devise, and he thereby from thence-

forth empowered and authorized the said William Henchman and Martin Harsant, or the survivor of them, or the executors or administrators of the survivor of them, to sell and dispose of the said copyhold lands, at longest within six months next after his decease, for the best price that could be got for the same; and the moneys arising therefrom, and from the rents and profits thereof, in the meantime, until such sale, together with his ready money and securities for money, after payment of his just debts, funeral expenses, the said legacy, and the other charges and expenses incident to the execution of his will, he disposed of in the manner thereafter mentioned. The testator proceeded to give

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1834.—*Henchman v. The Attorney-General*.

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several legacies; and as to the rest and residue of the money which should then remain, he gave and bequeathed one third part thereof to the honest and industrious poor living in Earlsam, in the county of Suffolk, and the remainder to the honest and industrious poor living in or belonging to the adjoining parishes, or to his poor distant relations not mentioned in his will.

The testator died without any customary heir or next of kin.

The original bill was filed by the executors against the Attorney-General, and the lords of the manor were afterwards made parties by a supplemental suit.

The questions at the hearing on further directions were, whether the devisee took the copyhold estate discharged of the condition for payment of the 2,000*l.*; and, if not, whether that sum, or such proportion of it as, under the trusts of the [\*487] will, was given after payment of \*debts and legacies to purposes of charity which failed by the statute, belonged to the lords of the manor, or to the crown. The Vice-Chancellor (Sir John Leach) decided that the devisee took the land subject to the payment of the 2,000*l.*, and that the crown was entitled by prerogative to that part of the bequest which failed by the mortmain act. The argument and judgment are reported in 2 Sim. & Stu. 498.

1829: *May 26th*.—The plaintiffs, the representatives of the devisee, presented a petition of rehearing, and the case was argued on the 26th of May, 1829, before Lord Lyndhurst, by Mr. Sugden and Mr. Kindersley for the appellants, and by Sir Charles Wetherell and Mr. Wray for the Attorney-General.

On the 24th of May, 1830, Lord Lyndhurst made the following observations:—The case of *Henchman v. The Attorney-General*, which was argued some time since, and which now stands for judgment, was an appeal from the decision of the present Master of the Rolls when Vice-Chancellor. The facts were these. A person of the name of Girling was seised of certain copyhold property in the county of Suffolk. He devised that property to Henchman, who was one of his executors, upon condition that he should pay 2,000*l.* to his co-executor, Martin Harsant. That sum of money he desired should be taken as part of his personal estate, and it was to be added to the residue of his personal estate; out of that joint sum his debts and legacies were to be paid, and the surplus was to be applied to charitable purposes.

This court decided that the bequest to those charitable [\*488] purposes was altogether void, as being contrary to \*the provisions of the Statute of Mortmain; in consequence of which the Master was directed, first, to inquire who was the heir at law of the testator Girling, and who were his next of kin. The Master reported that no person had made out a claim in point

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of evidence, either as heir at law or next of kin. The consequence was, that the lord of the manor, the devisee, and the Attorney-General on the part of the crown, respectively claimed this property, or rather the balance of this property, part of it having been applied to the payment of a proportion of the debts and legacies.

The case was very elaborately argued upon all the various points that suggest themselves in a case of this description; but there was one point that appears to me to require further consideration, and it is a point probably upon which my judgment will turn. The point I allude to is this; whether, if this is to be considered as real estate in a court of equity, the crown would take it by virtue of its prerogative? The Master of the Rolls stated in the course of his judgment that the crown could not take it by escheat; but whether it was to be considered as personal estate or real estate, the crown would take it by virtue of its prerogative. That point certainly was argued at the bar, but no authorities were cited; and as I do not think that so much attention was paid to it as the importance of the question demands, and as it probably will govern my judgment with respect to this case, I should wish that point to be argued distinctly and separately by one counsel on each side, and that an early day should be appointed for that purpose.

1834: *May 23d.*—Lord Lyndhurst shortly afterwards resigned the Great Seal, and the case was eventually re-argued by one counsel on each side before Lord Brougham.

\**Mr. Kindersley* for the appellants:—Where an estate [\*489] is devised subject to a charge, which fails either because it is void by the Statute of Mortmain or for any other reason, it has been held that the charge sinks into the estate for the benefit of the devisee: *Wright v. Row*, (a) *Jackson v. Hurlock*. (b) The case of a charge is distinguished in this respect from an exception out of the gift; for, if it be an exception out of the devise, the heir will be entitled to the benefit of the failure; *Gravenor v. Hallum*. (c)

The terms of this devise, however, are terms of condition, and considering it as a devise upon condition, who is the person, in the case of a freehold or copyhold estate, entitled to take advantage of a breach of the condition? It is laid down by Littleton, (d) that the lord by escheat cannot take advantage of a condition broken; and Lord Coke, (e) in commenting on the Statute 32 H. VIII, which gives a right to the grantor of a reversion to enter

(a) 1 Bro. C. C. 61.

(b) 2 Ed. 263.

(c) Amb. 643; and see *Cooke v. The Stationers' Company*, 3 Mylne & Keen, 262.

(d) Lit. s. 343.

(e) Co. Litt. 216 a.

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for a condition broken, says expressly, "But such as come in merely by act in law, as the lord by escheat, the lord that entereth or claimeth by mortmain, or the like, shall not take benefit of this statute." In respect of the right of taking advantage of a condition broken, the crown cannot stand in a better situation than the lord, and the doctrine of prerogative is wholly inapplicable to a case of this kind. The case of *Arnold v. Chapman*,<sup>(a)</sup> is an authority upon all fours with the present case to show that it must be considered as real estate undisposed of, and not as personalty. In *Arnold v. Chapman*, the testator gave a copyhold [\*490] estate to the defendant Chapman, he causing to be paid to his executors, the sum of 1,000*l.*, and after payment of his debts and legacies, he gave the residue of all his estate to charitable purposes; and Lord Hardwicke held the charge to be part of the testator's real estate undisposed of, and for the benefit of the heir. If there were an heir in the present case, a question might arise, as in *Smith v. Claxton*,<sup>(b)</sup> whether the charge was descendible as land, or transmissible in the hands of the heir to his personal representative; but there can be no question as between the heir and the next of kin, and consequently, no question whether the crown can have any possible title to this estate as *bona vacantia* by virtue of its prerogative.

If the crown, therefore, has any title, it can only be by way of escheat, and it has been decided that copyholds cannot escheat to the crown; *Walker v. Denne*.<sup>(c)</sup> But even if there were not that decisive objection, the claim of the crown would be excluded by the doctrine established in *Burgess v. Wheate*,<sup>(d)</sup> that the crown can never come into Chancery to compel the execution for its benefit of a trust which the heir might have compelled to be executed. The crown has no equity in this court to stand in the place of the heir at law, and the devisee, therefore, is entitled to take the estate discharged of the condition. As to the claim on the ground of prerogative, no case can be cited in which it has ever been held, that the prerogative of the crown extends to the case of executing a trust of real estate.

Mr. Wray for the crown:—The testator intended that the devised copyhold estate should be entirely converted into [\*491] money; in disposing of the residue, he mixes the money to arise from the sale with his ready money and other personal estate, and clearly desired that the copyhold estate so converted, should possess all the qualities of personal estate; *Mallabar v. Mallabar*,<sup>(e)</sup> *Durour v. Motteux*,<sup>(g)</sup> *Phillips v.*

(a) 1 Ves. sen. 108.

(b) 4 Mad. 484.

(c) 2 Ves. jun. 170.

(g) 1 Ves. sen. 320, and 1 Sum. &amp; Stu. 292, n.

(d) 1 Black. 123, and 1 Ed. 177.

(e) Ca. Temp. Talb. 78.

*Phillips.*(a) There is a partial failure of the purpose of the devisor in respect of that proportion of the 2,000*l.*, which is devoted to charity, and the customary heir is entitled to the benefit of the failure; but he is entitled to it as money, and not as land, and it is transmissible as money to his personal representative, and not as land to his heir; *Smith v. Claxton.*(b) If the heir of the testator were entitled to the charge as unconverted real estate, the doctrine laid down in *Burgess v. Wheate*, and in *Walker v. Denne*, would apply, and the crown would have no title; but if the charge be shown to be money, the case of *Middleton v. Spicer*,(c) has decided that, where there is no next of kin, the executor is a trustee for the crown. It is immaterial that the charge has not been raised, and that the land continues in *specie*, for in equity the land which ought to be converted, and which by the will was directed to be converted, is considered as money; and the crown is entitled to it by virtue of its prerogative.

Mr. *Kindersley* in reply :—The question is not here, as in *Smith v. Claxton*, in what character land directed to be sold, and as to which there is a total or partial failure of the testator's purpose, descends to the heir; but whether the crown, by virtue of its prerogative, has a right to insist that the land \*shall [\*492] be converted into personalty. *Walker v. Denne*,(d) has decided that where land continues in *specie*, and it remains *ad arbitrium* whether it is to be considered as land or money, the crown has no equity in this court to compel its conversion into personalty for the purpose of making a title.

1834: *August 5th.*—LORD CHANCELLOR BROUGHAM :—The question here arose principally between William Henchman, the devisee of a copyhold estate, and the crown, (for the lord of the manor did not join in the appeal,) and it related to the sum of 2,000*l.*, which the devisee was to pay the executor within a month after the testator's decease, and which was treated as personalty by the testator, and devised to a charitable use with the other parts of the residue. There was no customary heir or next of kin, and the question was, did the devisee take the copyhold discharged of the condition for payment of 2,000*l.*, and if not, did that sum belong to the crown?

His Honor, the Master of the Rolls, held that, whether this sum were to be regarded as real estate or as personalty, made no difference; for, in either case, the crown was entitled by prerogative, though not by escheat. If it was real estate, the crown took for want of a customary heir; if personal, for want of next of kin.

(a) 1 *Mylne & Keen*, 649.

(b) 4 *Mad.* 484.

(c) 1 *Bro. C. C.* 201.

(d) 2 *Ves. jun.* 170.

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I cannot at all go along with this view of the subject. The crown has no such prerogative; it may take personalty as *bona vacantia*, but real estate it can never take unless by escheat, which here can have no place, because the copyhold tenement must escheat to the lord, \*and not to the crown; [\*493] but any prerogative extending to real estate, as distinct from escheat, I never yet heard of.

The case of *Arnold v. Chapman*(a) was one which received great consideration, and Lord Hardwicke there decreed that—copyhold land being devised to A., he paying 1,000*l.* to the testator's executors, and, after payment of debts and legacies, the residue to the Foundling Hospital—the 1,000*l.* was to be considered as real estate undisposed of; and that the executors took it under a resulting trust for the heir at law, the mortmain act rendering its application to the charity illegal. This decision proceeded upon the ground of the sum given to charitable uses being excepted out of the devise, and so undisposed of, unless the gift was valid, which by the statute it was not.

*Gravenor v. Hallum*(b) and other cases take the same view of the subject; on the other hand, where lands are given subject to a charge, and the charge is void under the mortmain act, the sum charged shall sink into the specific devise. *Wright v. Row*,(c) and *Jackson v. Hurlock*,(d) sufficiently illustrate the distinction.

In the present case it does not appear to be material, whether the sum is considered as excepted out of the devise, or as a charge upon it; and for this reason. In the latter case, the devisee takes the whole at once, subject only to a charge which has no effect; in the former view there is a resulting trust for [\*494] the heir; but \*the heir cannot be found, or rather there is none, and such trust cannot escheat to the lord of the manor. Indeed, as long as there is a tenant to perform the services, the lord never can take by escheat, and it would be absurd and contrary to all principle, and inconsistent with the very nature of property to hold that, while the devisee was in as tenant of the copyhold in general, a portion of it, or a sum charged on it, was in the possession, or rather in the holding of no one, and so escheated *pro defectu hæredis*. As, therefore, the lord cannot take; as, beyond all question, the crown cannot take; and as there is here no heir of the testator, the devisee alone can take. He takes from necessity, indeed, and because there is none other to take, the resulting trust failing for want of a *cestui que trust*.

But there is another view which may be taken of the question. The money has never been raised; the condition on which the gift was made is unperformed; and this court must be resorted

(a) 1 Ves. sen. 108.

(b) Ambler 643.

(c) 1 Bro. C. C. 61.

(d) 2 Ed. 263.



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to, in order to vest the money in the executors, and make the devisee perform his condition. Now, that the court will raise the money for the heir at law whom it jealously protects, and will thus execute the trust which results in his favor so as to treat the proportion given contrary to the statute, as if it were not given at all, and were still estate descendible on the heir, is certain, and the cases from *Arnold v. Chapman* downwards show it. But the court has never lent itself to raise money charged and destined to an illegal use for any other party, certainly not for the crown; indeed that principle is sufficiently established by the case of *Walker v. Denne*.<sup>(a)</sup>

\*That the crown cannot take by escheat, this being [\*495] copyhold, I have already observed. That this is not personalty, there needs no argument to show; indeed, *Arnold v. Chapman* and all the cases prove it. That the crown can in no way be entitled, is therefore clear. For, as to the prerogative touching such a case, it is contrary to the plainest and most fundamental principles governing English tenures.

But, if neither the crown nor the lord can take, the question lies between the devisee and the testator's heir, who has no existence by the case. Therefore, upon the present state of the facts, the devisee is entitled, and the judgment below must be reversed, and the deposit returned.

(a) 2 Ves. jun. 170.

## WASSE v. HESLINGTON.

ROLLS.—1834: 30th June.

Where a testator directs that his debts and funeral expenses are to be paid by his executors, it is *prima facie* to be considered that he means the payment to be made by them out of the funds which come to their hands as executors. Whether he intends that all property, which he gives to his executors, shall be subject to the payment of his debts and legacies, must be gathered from the whole will.

THOMAS HESLINGTON, by his will, dated the 16th of November, 1831, in the first place, directed all his just debts and funeral and testamentary expenses, to be paid by his executors thereafter named; and he gave unto his wife Isabella, all his household furniture, plate, linen, &c., which should be in and about his house at the time of his death. And he devised to his wife and her assigns, during her life, the dwelling-house at Skelton, with the appurtenances (except the barn) thereunto belonging, and from and after her decease he \*devised the [\*496] same unto and to the use of Thomas Heslington, of Skelton, his heirs and assigns forever. He also gave to his said wife and her assigns, during her life, one yearly rent charge of 180*l*.

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to be paid to her by equal quarterly payments; and he charged the same on the real estates thereafter by him devised to the said Thomas Heslington: and he thereby declared, that the provision made for his wife should be accepted by her in lieu and satisfaction of all dower and freebench which she might be entitled to upon his decease. And he gave the freehold closes or parcels of land and hereditaments then lately purchased by him, situate in the township of Dishforth, in the county of York, and also the sum of 1,000*l.*, (which, as well as the legacy duty for the same, he charged upon the real estates thereafter by him devised to the said Thomas Heslington,) unto the said Thomas Heslington, and his brother in law, George Parker, their heirs, executors, administrators and assigns respectively, in trust immediately after his decease, to place out at interest the said sum of 1,000*l.*, and to pay the interest thereof, and also the rents, issues and profits of the said freehold closes, unto his wife's niece, Isabella, the wife of Thomas Forest, during her life for her separate use; and after her decease, in trust that Thomas Heslington and George Parker, their heirs, executors, administrators and assigns respectively, should stand seised of the said freehold closes or parcels of land, and be possessed of the said sum of 1,000*l.*, and interest upon such trusts as the said Isabella Forest should appoint; and in default of such appointment, in trust for all and every the child and children of Isabella Forest, who, being sons, should attain twenty-one, or daughters should attain that age or marry, to be equally divided between them; but if there should be no such child, as to the freehold closes for the right [\*497] heirs of Isabella Forest, and as to the sum of \*1,000*l.*, in trust for such person living at her decease, as would be entitled thereto by virtue of the Statute of Distributions. And the testator devised all such of his messuages, lands, &c., as were situate in the township of Kirkby Hill, and the close or parcel of land containing about six acres, therein described, unto and to the use of his said wife Isabella, and her assigns during her life. And from and after her decease he devised the same unto the said George Parker, his heirs and assigns forever, subject nevertheless to, and chargeable with the sum of 1,000*l.*, which he thereby gave unto the said Thomas Heslington, and directed to be paid at the end of six calendar months after the death of his said wife, but to be a vested interest in the said Thomas Heslington, immediately on the testator's decease. The testator proceeded to give two annuities, which he charged on the residue of his real estates devised to the said Thomas Heslington, and he gave to the two daughters of Hannah Tryers, the sum of 50*l.* apiece, to be vested interests in them at his decease, but not payable until six calendar months after the death of their mother, and he charged the same on the residue of the real estates de-

1834.—*Wasse v. Heslington.*

vised to the said Thomas Heslington; and he then gave several pecuniary legacies, all which he charged upon the residue of his real and personal estate, devised and bequeathed to the said Thomas Heslington. And he devised and bequeathed unto the said Thomas Heslington all his freehold, copyhold and leasehold estates whatsoever in Great Britain, except certain hereditaments and premises thereinbefore mentioned, and all his personal estate whatsoever, (except such part of his personal estate as was bequeathed to his said wife,) to hold the same unto and to the use of the said Thomas Heslington, his heirs, executors, administrators and assigns respectively, according to the natures thereof respectively, and for all his estate and interest therein, subject \*to the several annuities and legacies charged [\*498] thereon. And he appointed the said Thomas Heslington and George Parker executors of his will.

This was a creditor's suit, and the question in the cause was, whether the testator had charged his real estates with the payment of his debts.

Mr. *Bickersteth* and Mr. *Monro* for the plaintiff:—The introductory clause, in which the testator directs all his just debts, and funeral and testamentary expenses to be paid by his executors thereinafter named, imposes a condition upon those executors, to satisfy the testator's debts out of all the property which they derive under the testamentary disposition, whether real or personal: *Henvell v. Whitaker*, (a) *Finch v. Hattersley*, (b) The case of *Henvell v. Whitaker* was decided after a careful examination of all the authorities. In *Clowdsley v. Pelham*, (c) though the lands were devised to the defendant in tail with a remainder over, yet, as the defendant was appointed executor, with a direction that he should pay the testator's debts, it was held that the lands were charged with the payment of the debts. In *Elliot v. Hancock*, (d) there were no express words to charge the land, but, the devisee being also appointed executor, the land was held to be charged with an annuity given by the will; and in *Alcock v. Sparhawk*, (e) where the testator directed the devisee, whom he appointed his executor, to see his will performed, it was held that the real estate was charged with the legacies. In this case the executors cannot, therefore, take the estates devised to them otherwise than subject to the payment of debts.

\*Mr. *Pemberton*, Mr. *Tinney*, Mr. *Turner* and Mr. [\*499] *Bichner*, contra:—A general direction to pay debts in the introductory part of a will has, no doubt, the effect of char-

(a) 3 Russ. 343.

(b) Ibid. n.

(c) 1 Vern. 411.

(d) 2 Vern. 143.

(e) 2 Vern. 228.

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ging the real estates with the payment of debts; but a direction for the payment of debts and funeral expenses by executors, is applicable only to such property as naturally comes to the hands of executors for that purpose. In *Henvell v. Whitaker* the introductory words of the will were extremely strong in favor of the construction put upon them, all the testator's just debts and funeral expenses being directed to be fully paid and satisfied by the executor thereafter named; and the testator afterwards gave all his real, personal and copyhold estates to that single executor. In this case each of the executors takes beneficial interests to a different amount under distinct devises. If the testator had intended, as in *Henvell v. Whitaker*, to impose a condition upon his executors, that they should pay his debts out of all his property, real as well as personal, that came to their hands, the executors would have been equally charged; but the different amount of their interests is inconsistent with that supposition. When the testator intends to create a charge upon his real estates, he expresses himself in terms which are free from all ambiguity. Thus, the estate devised to George Parker, after the death of the testator's wife, is made subject to and chargeable with the sum of 1,000*l.*, which he gives to Thomas Heslington; and he expressly charges two annuities on the residue of his real estates.

Mr. Bickersteth in reply.

THE MASTER OF THE ROLLS:—*Prima facie* the direction of the testator, that his debts and funeral expenses shall be paid [500] by his executors, \*imports an intention that the debts and funeral expenses are to be paid by them out of the funds which come to their hands as executors.

In the case referred to it appeared to me to be manifest from the whole will, that the testator intended to subject all his property given by his will to the executors, with the payment of his debts and funeral expenses.

It appears to me in this case to be equally manifest that he had not that intention.(a)

(a) See *Warren v. Davies*, 2 Mylne & Keen, 49.

#### VICKERS v. SCOTT.

ROLLS.—1834: 6th and 7th July.

Where the testator directs a sale with all convenient speed after his death, and directs the produce to be invested and the dividends to be paid to one for life, and the land remains unsold, the court considers twelve months as a reasonable time

1834.—Vickers v. Scott.

within which the estates ought to have been sold, and the produce invested, and will give to the tenant for life the rents of the unsold estate from that time.

JOHN COTTON, by his will, dated the 15th of January, 1829, after directing that all his just debts, and funeral and testamentary expenses should be paid by his executors thereafter named, and after making certain devises and specific bequests of parts of his property, gave, devised and bequeathed to George Scott, George Dicken and Thomas Hughes, (whom he appointed his executors,) their heirs, executors, administrators and assigns, all his estate, property and effects, whether real or personal, that he might be possessed of or entitled to at the time of his decease, of what nature or kind soever, (not otherwise by him specifically disposed of,) upon trust that they or the survivor of them, or the heirs, executors and administrators of \*such [501] survivor should, with all convenient speed after his decease, sell and dispose of all his freehold messuages, and all other his estate, property and effects, real and personal, either by public auction or private contract, and should convert into money all such parts of his personal estate as should not consist of money out upon security or otherwise, (except only a certain bond debt of the said George Dicken, and money in the public funds,) and also collect and get in all book and other debts due and owing to him at the time of his decease, in such manner as they should deem expedient. And after directing the trustees to wind up his partnership affairs, and after giving certain legacies and annuities with the payment whereof he charged his whole estate, as concerning all and singular other the property which he was possessed of or entitled to, or over which he might have a disposing power at the time of his decease, he gave, devised and bequeathed the same to the same trustees, their executors, administrators and assigns, in trust to stand possessed thereof, and of the said moneys to be gotten in under the trusts of his will, upon further trust to lay out and invest the whole of the trust moneys in the purchase of parliamentary stocks or funds of Great Britain, or at interest upon real security, in their names, or the names of the trustees for the time being, and to alter and vary the same for other securities of the like nature, as occasion should require, so as the same should be done with the consent in writing of the person or persons of full age who then might by his will be beneficially interested therein, or deemed to be so, and to stand possessed of the same trust moneys, and of the dividends, interest and proceeds of the funds and securities upon which the said moneys should be so laid out and invested, and of the rents, issues and profits of all other his estate and effects whatsoever, until sale or investment. And \*upon invest- [502] ment thereof in manner aforesaid, the testator directed

1834.—Vickers v. Scott.

ging the real estates with the payment of debts; but a direction for the payment of debts and funeral expenses by executors, is applicable only to such property as naturally comes to the hands of executors for that purpose. In *Henvell v. Whitaker* the introductory words of the will were extremely strong in favor of the construction put upon them, all the testator's just debts and funeral expenses being directed to be fully paid and satisfied by the executor thereafter named; and the testator afterwards gave all his real, personal and copyhold estates to that single executor. In this case each of the executors takes beneficial interests to a different amount under distinct devises. If the testator had intended, as in *Henvell v. Whitaker*, to impose a condition upon his executors, that they should pay his debts out of all his property, real as well as personal, that came to their hands, the executors would have been equally charged; but the different amount of their interests is inconsistent with that supposition. When the testator intends to create a charge upon his real estates, he expresses himself in terms which are free from all ambiguity. Thus, the estate devised to George Parker, after the death of the testator's wife, is made subject to and chargeable with the sum of 1,000*l.*, which he gives to Thomas Heslington; and he expressly charges two annuities on the residue of his real estates.

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that the whole of his residuary trust property, estate and effects, should be considered as divided into two equal moieties or half parts, and that his said trustees should stand possessed of the said several moieties upon trust, as to one of such moieties, to pay the dividends, interest and annual produce thereof into the proper hands of his daughter, Priscilla Vickers, the plaintiff, for her own sole and separate use, free from the power, control, debts and engagements of her present, or any after-taken husband or husbands, for the term of her natural life, without power of anticipation, and after her decease, upon trust for all and every the child and children of his said daughter, equally to be divided between them, share and share alike. As to the other moiety of the said trust moneys and premises, and the interest, dividends and annual produce thereof, he directed that his trustees, or trustee for the time being should, from time to time, during the life of his said daughter, or until her eldest child, if a son, should attain twenty-one, or if a daughter, should attain that age or be married, pay the same into the hands of his said daughter, to be by her at her own discretion paid and applied towards the maintenance of all and every her child and children.

The testator died in January, 1830, leaving Priscilla Vickers, his only child and heiress at law, surviving him; and the bill was filed by Mrs. Vickers, with her husband and children, against the trustees and executors, for the purpose of having the trusts of the will carried into execution. The freehold and leasehold estate of the testator remained unsold, and a question was made at the hearing on further directions—from what time Mrs. Vickers, the tenant for life, was entitled to receive the rents and profits.

[\*508] \*Mr. Cooper, for the tenant for life, submitted that, upon the first part of the will, in which the trustees were directed to sell the estates with all convenient speed after the testator's decease, Mrs. Vickers would be entitled to receive the rents and profits from the death of the testator, upon the principle that a court of equity considered that to have been done which ought to have been done, and that *prima facie* a direction to sell with all convenient speed, must be considered as a direction for an immediate sale; *Fitzgerald v. Jervoise*.<sup>(a)</sup> The only question was, whether the subsequent direction that the trustees should stand possessed of the trust moneys and the rents and profits until sale and investment, and that, upon investment, the whole residuary property of the testator should be considered as divided into two equal moieties, to be disposed of in the manner therein directed, made any difference as to the life interest of

(a) 5 Mad. 25.



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Mrs. Vickers, and whether it brought the case within the principle established in *Sitwell v. Bernard*.<sup>(a)</sup> If the court should be of opinion that the interim of rents and profits before sale were undisposed of, Mrs. Vickers would be entitled as heiress at law. *Walker v. Shore*,<sup>(b)</sup> *Gibson v. Bott*,<sup>(c)</sup> *Stott v. Hollingworth*,<sup>(d)</sup> and *Angerstein v. Martin*,<sup>(e)</sup> were referred to.

Mr. Wray, for the trustees, said there was in this case no gift to the tenant for life until conversion, and that, upon conversion, the whole residuary estate was applicable in equal moieties to the purposes pointed out by the will. It was clearly not the intention of the testator to die intestate as to any part of his property. No claim, therefore, could be made by Mrs. Vickers to the \*intermediate rents and profits in her character of heiress at law. The question was, when was her interest to commence; and that question depended on what was to be considered a reasonable time to be allowed to the trustees and executors for converting the real estate into money. That time was usually understood to be a year from the death of the testator.

THE MASTER OF THE ROLLS:—The tenant for life, by the clear language of the will, is not entitled to the rents and profits of the residuary real estate until it has been sold, and the produce invested. The sale is by the will directed to be made with all convenient speed after the testator's death; and that the sale has not yet taken place can work no prejudice to the tenant for life. It is consistent with principle and authority, that twelve months should be considered as the time within which the sale might reasonably have been made, and from that time the tenant for life is entitled to the rents of the estate.

(a) 6 Ves. 520.

(b) 19 Ves. 387.

(c) 1 Ves. 89.

(d) 3 Mad. 161.

(e) Turn. & Russ. 232.

\*RATTENBURY AND WADE v. FENTON.

[\*505]

ROLLS.—1834: 30th May.

An engagement by A. to answer the draft of B. for payment of a debt due from B. to C., no draft having been drawn by B., and no communication of the transaction between A. and B. having been made to C., raises no equity in C. to recover the amount of the debt from A.

The owner of a ship proposes to his agent, to whom he was indebted on account, to transfer the ship to him, provided the agent would answer the owner's draft for the amount of the repairs, in respect of which the owner was indebted to a third person not named. The ship was, in pursuance of this proposal, transferred to the agent; and the vendor afterwards became bankrupt, without having drawn upon the purchaser, and without any communication of the terms of the purchase having been made to the creditor to whom the vendor was indebted for the repairs.

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There is no consideration between the purchaser and the vendor's creditor to entitle the latter to recover from the purchaser the amount of the repairs.

In the year 1827, Robert Snowden was the sole owner of a ship, called the Elizabeth, which was registered in his name, and he employed Messrs. James and Henry Cumming, of Liverpool, as his agents and insurance brokers. In that year, Snowden, having returned from a voyage with his vessel much damaged, applied to Messrs. Cumming to recommend him a shipwright who might do the repairs, and Messrs. Cumming recommended Snowden to employ the plaintiff Wade. Snowden accordingly applied to the plaintiff Wade, and Wade, not having a dock of his own, recommended the plaintiff Rattenbury; and in the result, Rattenbury undertook to perform the repairs, Wade having guaranteed the payment.

The repairs were completed in the year 1827, and Rattenbury's bill amounted to 766*l.* 2*s.* 5*d.*, of which sum 105*l.* only were paid by Snowden.

In March, 1827, Snowden, being pressed by Rattenbury for payment of the remainder, wrote the following letter, dated the 20th of that month, to Henry Cumming, James Cumming having shortly before died:—

"The Elizabeth will require a new register in London: wishing to know from you if you would be inclined that I [\*506] \*should make a transfer to you of my vessel, provided you would answer my draft for the repairs in London, from 600*l.* to 700*l.*, as it appears from Mr. Hunt, that the underwriters will not settle till the owners first pay off all, I remain, &c."

No answer was returned to this letter, but, on the following day, Hunt, the clerk of Henry Cumming, wrote a letter to Messrs. Smith & Sundius, the London agents of the late firm of Messrs. Cumming, to the following effect:—

"Captain Snowden made application to us relative to a new register being got for the Elizabeth; and I am desired by Mr. Henry Cumming, to request that you will get him to execute a bill of sale in his name, and to obtain from the custom house what are necessary documents for that purpose, and to send them down here as soon as you can. Captain Snowden will, of course, be with you before this reaches.

"Yours obediently, for J. and H. Cumming,  
"WILLIAM HUNT."

On the 26th of March, 1827, a bill of sale of the ship was executed by Snowden, to Henry Cumming, the consideration for the transfer being stated to be 1,800*l.*, but no money passed.

In April, 1827, a new register of the vessel was granted to

Henry Cumming, who shortly afterwards sold the vessel and applied the proceeds of it to his own use.

In May, 1827, Snowden directed Messrs. Smith & Sundius to draw a bill on Henry Cumming, at a short date, in favor of Rattenbury, for 661*l.* 2*s.* 5*d.*, the balance due for the repairs, and to deliver the same when \*accepted to Rattenbury. A bill was drawn accordingly, and sent to Henry Cumming, who refused to accept it, alleging that a large balance was due to the firm of Messrs. Cumming on the account between them and Snowden. [\*507]

In October, 1827, Snowden was declared a bankrupt, and the plaintiff Rattenbury was appointed his assignee. Rattenbury, as such assignee, filed a bill against Henry Cumming, praying that the sale of the ship might be set aside on the ground of its being an assignment of the bankrupt's whole property, and also on the ground of its being a fraudulent preference. That cause was heard before the Vice-Chancellor in July, 1832, and was dismissed without costs. The present bill was filed by Rattenbury and Wade, to whom Rattenbury had assigned his debt against the personal representative of Henry Cumming, who had died since the hearing of the former suit; and it prayed that it might be declared that Henry Cumming had, upon the execution of the bill of sale, made himself liable to pay the debt of 661*l.* 2*s.* 5*d.* due to the plaintiff Rattenbury.

Mr. *Bickersteth* and Mr. *Cooke*, for the plaintiffs, contended that the passage in Snowden's letter, "provided you would answer my draft for the repairs," ought to be liberally construed, and not to be understood as applying only to a draft for the amount of the repairs to be drawn by Snowden. In a court of equity it might well be taken to mean, what in substance it did mean, a proposal on the part of Snowden to transfer the ship to Cumming, provided the latter would be answerable for the payment of the repairs. That was the basis of the proposal, and the substantial intention of the parties; and unless such a construction were put upon the letter, Rattenbury, or the party who represented his debt, would be deprived of all compensation for the repairs of the vessel.

\*Mr. *Tinney* and *Kee* appeared for the defendant, but [\*508] were not heard.

THE MASTER OF THE ROLLS:—There is no consideration between the plaintiff and Cumming upon which this bill can be maintained. The engagement of Cumming was an engagement to accept a bill drawn by Snowden for the payment of repairs, and Snowden never drew the bill. An undertaking to answer a

1835.—In re Dearden.

man's draft is an undertaking to pay that man's demand, not the demand of another person. I should be glad in this case to assist the plaintiff, but there is no privity between him and the defendant; there is no consideration between him and Cumming, and I cannot so extend the expressions used in the letter as to raise such a consideration. If any communication of the transaction between Snowden and Cumming had been made to Rattenbury, a consideration might have been presumed, such as a forbearance to sue the original debtor, but no such communication appears to have been made. The bill must be dismissed, but without costs.

## IN RE DEARDEN.

ROLLS.—1835: 24th March and 16th April.

The eighth section of the 1 W. IV, ch. 60, relates to trusts only, and not to mortgages; and to positive or naked trustees, and not to constructive trustees, or trustees by operation of law.

BY indentures of lease and release, dated respectively the 11th and 12th of February, 1802, and made between James Carter and Ann, his wife, of the first part, James Dixon, of the second part, and John Downham, of the third part, certain lands [\*509] were conveyed \*to John Downham and his heirs in trust for securing the repayment of 700*l.* and interest, and, subject thereto, for securing an annuity of 10*l.* to James Dixon, and subject thereto, and to a joint power of appointment given to James Carter and Ann his wife, the estates were limited to the use of Carter and his wife for their lives, and, after the decease of either, to the use of the survivor and his or her heirs.

John Downham died in the year 1818, having made his will, dated the 14th of January, 1815, by which he appointed his nephew, John Downham, the younger, who was his heir at law, his sole executor. The testator made no disposition by his will of the estates vested in him by the deeds of the 11th and 12th of February, 1802.

John Downham, the younger, proved the will of his uncle, and died without issue and intestate as to the above mentioned estates, but having made a will by which he appointed executors since deceased.

John Downham, the younger, had three sisters, Margaret, the wife of Joseph Dearden, Mary, the wife of Matthew Oddie, and Ann, the wife of John Taylor: and at the time of his decease, John Dearden, the eldest son of Margaret Dearden, Mary Oddie and Ann Taylor were his co-heirs. Mary Oddie died, leaving Ann Horner her only child, and Ann Taylor died, leaving William Taylor her heir at law, and the legal estate in the mortgaged

1885.—*In re Dearden.*

premises was consequently vested in John Dearden, Ann Horner, and Ann Taylor.

James Carter survived his wife, no joint appointment having been executed, and made a will by which he gave all his lands and hereditaments to trustees and their heirs in trust for his daughters, the petitioners, Dorothy Jackson and Jessy Thompson.

\*Dixon, the annuitant, was long since dead. [\*510]

The petition, after setting forth these facts, proceeded to state that John Dearden had for many years resided out of the jurisdiction of the court; that the petitioners had paid or were about to pay off the said mortgage, but that they were unable to obtain a conveyance of the legal estate of the one-third part of the mortgaged premises vested in John Dearden, and it prayed that John Dearden might be declared to be a trustee within the meaning of the act of 1 W. IV, c. 60, intituled an act for amending the laws respecting conveyances and transfers of estates vested in trustees and mortgagees, &c., and that some person might be appointed to convey the said one-third part of the mortgaged premises to the petitioners.

Mr. Walker, in support of the petition, submitted that the present case was distinguishable from *In re Goddard*(a) and *In re Stanley*,(b) in which cases the court had refused to make an order under the 1 W. IV, c. 60. In both those cases the heirs, who could not be found, were heirs of the mortgagees, and as mortgagees were not expressly mentioned in the eighth section, and the heirs were not heirs of trustees while the mortgage money remained unpaid, it was held that they were not within the eighth section. That objection did not apply to the present case, because Downham, the nephew, who was the heir of the mortgagee, though not the heir of a trustee, was a trustee for the executors of the mortgagee; and Dearden, who was out of the jurisdiction, was the heir of that trustee. Dearden clearly came, therefore, within the eighth section, being the heir of a trustee, and, upon payment of the mortgage money, which, if not actually paid, the petitioners were ready to pay, he would be a trustee for the petitioners.

\*April 16th.—THE MASTER OF THE ROLLS:(c)—This [\*511] was a petition by parties claiming to be owners of the equity of redemption of certain premises conveyed to John Dearden, in fee, by way of mortgage. John Dearden died, leaving his nephew, John Downham, his heir, executor, and residuary legatee.

(a) 1 Mylne & Keen, 25.

(b) 5 Sim. 320.

(c) Sir C. C. Pepys.

1835—*In re Dearden*.

John Dearden, the nephew, died, having appointed executors; but the mortgaged premises descended to his co-heirs, being two sisters, and John Dearden, the son of another sister deceased, who is in America; and the question is, whether John Dearden is a trustee within the meaning of the 11 G. IV, and 1 W. IV, c. 60. If so, it must be under the eighth section, and that section provides only for the absence of persons seised of any land upon any trust, and there is no mention of mortgagees; whereas, the sixth section, which provides for the event of the infancy of persons seised, includes mortgagees as well as trustees.

The only question is whether the heir of a mortgagee, in whom a mortgaged estate is vested, the title to the mortgage money being in his personal representative, be a trustee within the meaning of the eighth section. The heir certainly has no beneficial interest, and he is constructively a trustee for the personal representative of the mortgagee, or for the person entitled to receive the mortgage-money before the money is paid, and for the owner of the equity of redemption after it has been paid. But the question is, does the eighth section apply to such a trustee? The cases *In re Goddard*,<sup>(a)</sup> and *In re Stanley*,<sup>(b)</sup> do not govern \*this case, because they were both cases of the heir of a mortgagee not being known; and the eighth section provides only for the heir of a trustee not being known.

The heir of a mortgagee may be a trustee, but the mortgagee himself was not a trustee. The present is the case of a person who is the heir of a mortgagee, (for John Downham, the nephew, having been seised of the mortgaged land, and being also heir of the mortgagee, must be considered as the mortgagee for this purpose,) seised of the land upon trust being out of the jurisdiction; and the question is, whether the heir of the mortgagee be a trustee within the meaning of this section. I am of opinion that this section, taken by itself, relates only to positive or naked trustees, because the cases of constructive trustees are provided for by sections sixteen and eighteen, which would have been useless if constructive trusts had been within the eighth section; nor can the provision of the eighteenth section here remove the difficulty, because that section provides that, where the alleged trustee has, or claims a beneficial interest adversely to the party seeking the conveyance, no order can be made under the act, until it shall have been declared in a suit that such a person is a trustee for the person seeking the conveyance; but this cannot be effected in the absence of the heir of the mortgagee. I am, therefore, of opinion, that the order cannot be made.<sup>(c)</sup>

(a) 1 Mylne & Keen. 25.

(b) 5 Sim. 320.

(c) The 4 & 5 W. IV, c. 23, s. 2, assumes that mortgagees, and the heirs of mortgagees, are included in the eighth section of the 1 W. IV, c. 60, and provides that where any person, seised of any land upon any trust or by way of mortgage, dies

1834.—Thrupp v. Harman.

without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the act 11 G. IV, and 1 W. IV, in case such trustee or mortgagee had left an heir, and it was not known who was such heir. In *Ex parte Whitton*, (1 Keen, 278,) the present Master of the Rolls thought that an unknown heir of a mortgagee was within the eighth section of the 1 W. IV, c. 60, explained by the subsequent act, and made the usual order of reference.

## \*THRUPP v. HARMAN.

[\*513]

ROLLS.—1834: 17th March.

A wife cannot recover more than a year's arrears of pin money after long acquiescence in the receipt of it by her husband, notwithstanding claims made by the wife during the husband's lifetime, and a promise made by the husband that she should have an equivalent, such promise not, under the circumstances, amounting to an undertaking to pay the arrears.

By a settlement dated the 21st of October, 1806, and made on the marriage of William Harman and Mary Harman, then Mary Wells, it was covenanted that the trustees of the settlement should hold certain copyhold premises, to which the intended wife was entitled, upon trust to receive the rents, and pay over the same into the proper hands of Mary Harman, for her sole, separate, personal, and peculiar use and benefit, or to such person or persons as she should appoint. And it was thereby declared that the said hereditaments and premises, and the rents and profits thereof, should not be subject or liable to the power, control, debts, engagements, or incumbrances of the said William Harman, and that the receipts of Mary Harman alone, or of such other person as she should appoint to receive the same, should be a good and sufficient discharge for the rents and profits of the said hereditaments and premises.

The marriage took effect shortly after the date of the settlement. At the time of the marriage the principal part of the copyhold premises was occupied by Jane Wells, the mother of Mrs. Harman, and was held by her, rent free, until her death, which happened in the year 1817. From that time the rents were received by Mr. Harman until his death, which happened in the year 1830. He also received, for the most part, the rents of another \*small portion of the copyhold [\*514] premises from the time of his marriage until his death; but the rents of this part of the property were occasionally received by Mrs. Harman.

A claim was made before the Master, on behalf of Mrs. Harman, against the estate of her deceased husband, to the sum of 658*l.* in respect of the rents so received by Mr. Harman. In support of that claim it was stated and charged, the statement and charge being supported by affidavits, that Mr. Harman, from

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1834.—Thrupp v. Harman.

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time to time when he received the rents, promised his wife that he would invest them, or otherwise dispose of them for her benefit, as she should direct; and that Mrs. Harman, confiding in such promise, was induced to permit him to receive the same without her interference, and without making any application to the trustees in respect thereof. It was further stated that the investment of the rents was often the subject of conversation between Mr. Harman and his wife, and that it was agreed between them that the accumulations of the rents should be invested in the purchase of stock in the joint names of their only surviving daughters, Mary Wells Harman and Jane Elizabeth Harman; and, in particular, that, three weeks before his decease, Mr. Harman expressed his intention of going to the Bank of England to invest the sum of 1,000*l.* sterling in the purchase of stock, in the names and for the benefit of the said children, but was persuaded to defer the execution of such intention in consequence of indisposition.

A counter-affidavit was filed which did not materially vary the foregoing statements. The deponent stated that, although Mr. Harman did promise to invest 1,000*l.* in the bank a short [\*515] time before his death, yet the \*deponent believed that it was not from a conviction that the money was due to her, but for the sake of obtaining quiet, and to get rid of his wife's importunity.

The Master allowed only one year's net rent of Mrs. Harman's separate property for the year next preceding the decease of her husband.

An exception was taken to that part of the Master's report; and it was contended, in support of the exception, that although, where a wife lived with and was maintained by her husband, and her pin money was permitted to fall into arrear, the presumption was, that she had acquiesced in the application of her separate allowance by the husband to her own maintenance, yet that was a presumption capable of being rebutted, as where the wife was insane, or where she had made a continued claim to her separate property, which, to a certain degree, the wife had done in the present case. *Ridout v. Lewis*(a) was a case in point. There the husband paid 200*l.* a year to his wife, instead of 300*l.* pin money, to which she was entitled by the settlement made on their marriage, but he promised that she should have the whole at last; and Lord Hardwicke decreed that the promise amounted to a contract on the part of the husband, and that the wife was entitled to the whole arrears against the assets of her deceased husband.

On the other side, it was insisted that the present case was distinguishable from *Ridout v. Lewis*, inasmuch as there had

(a) 1 Atk. 269.



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 1834.—Giblett v. Hobson.
 

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been no payment or part payment of the pin money, *eo nomine*, to the wife, but the husband had continued in the receipt of the rents, except during the lifetime of his wife's mother, from the time of the \*marriage until his death. There [\*516] was no evidence of anything like a continued claim on the part of the wife, or of anything amounting to an agreement or recognition of a debt on the part of the husband; and unless this could be shown to be a debt in respect of separate property, advanced as such by the wife, the acquiescence of the wife had been properly presumed by the Master.

Mr. *Bickersteth* in support of the exception.

Mr. *Rolfe*, Mr. *Jacob*, Mr. *West* and Mr. *Teed contra*.

THE MASTER OF THE ROLLS:—A wife living with her husband may consent to waive her pin money, and the rule of the court, where it has not been received by her, permits her only to recover it for the last year. In the case referred to in *Atkyns*, the wife did not consent to or acquiesce in the detainer of her pin money; so far was she from acquiescing, that she immediately remonstrated with her husband when it was in part withheld from her, and, in consequence of that remonstrance, the husband assured her that she should have it at last.

In this case the wife, after the marriage, acquiesced in the receipt of the rents by her husband, and abstained for upwards of twenty years from using the rights which she might have exercised. She might originally have had the rents settled upon the same uses as those of the settlement, and she might, after the marriage, have compelled the husband to join with her in securing the rents for her benefit or that of her children. There was plainly an acquiescence, therefore, on the part of the wife.

\*But it is said that there was a subsequent promise [\*517] on the part of the husband. It has not been shown that there was any promise to pay the money; nor was there any promise which I can refer to a contract, as in *Ridout v. Lewis*, in respect of which contract the wife was induced to permit the husband to receive the rents. I am of opinion, therefore, that the conclusion to which the Master has come is right, and that this exception must be overruled.

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 GIBLETT v. HOBSON.

1834: 11th and 13th November.

A bequest of money to a charitable institution "towards building alms-houses to the said institution," is *prima facie* a bequest for buying land and building upon it, and

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consequently void under the Statute of Mortmain. But matter *dehors* the will may be looked at for the purpose of placing the court in the situation of the testator, in order to determine whether the testator contemplated building upon land already in mortmain, or to be acquired by other means than the application of the legacy. Held, in the particular case, that the extrinsic evidence, so admitted, was insufficient to support the bequest.

JOHN JAY GRAVES, by his will dated the 14th of June, 1831, made the following bequest: "I give and bequeath to the Butchers' Charitable Institution, the sum of 5,000*l.* towards building alms-houses to the said institution;" and he appointed the defendants executors of his will.

The testator was a member of the Butchers' Charitable Institution; and it appeared by evidence, tendered on the part of the plaintiffs, that he knew in the month of July, 1829, that a piece of land had been then lately offered by John Knight, one of the plaintiffs, for the erection of alms-houses for the use of pensioners of the institution. At a meeting of the members of the institution, held on the 9th of July, 1829, it was resolved that the offer should be accepted, and the thanks of the meeting were [\*518] voted to Knight. Various \*sums were subscribed towards the erection of the alms-houses, and a building fund was formed, which, by resolutions passed at a subsequent meeting, was kept distinct from the other funds of the society. In January, 1831, Knight sent the title deeds of the piece of land, (of the rents of which the building fund committee of the institution had been in the receipt from Midsummer, 1829,) to the plaintiff Giblett, who was the president of the institution, and a conveyance of the land was prepared; but the execution of that conveyance was delayed in consequence of the money subscribed not being sufficient to commence the building of the alms-houses. The testator died on the 28th of November, 1831. The conveyance of the land, made between Knight and the trustees by bargain and sale, duly enrolled according to the statute, was executed on the 28th of December following.

The bill was filed by the president and other officers of the institution, on behalf of themselves and the other members, against the executors of the testator, for payment of the legacy. The answer submitted that the bequest was void under the Statute of Mortmain. The cause was heard before the Vice-Chancellor, who decided that the bequest was void. The case is fully reported in the fifth volume of Mr. Simons' Reports, p. 651.

The plaintiffs presented a petition of rehearing to the Lord Chancellor.

Sir William Horne and Mr. Walker in support of the appeal:—To arrive at a just conclusion as to the effect of this bequest, the mere technical question as to the title of the society to the

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land given by Knight at the date of the \*will, and at [\*519] the death of the testator, cannot be properly brought into consideration. The land was, to all intents and purposes, given for the purpose of building alms-houses at the time when the testator made his will; the society was actually in possession in the lifetime of the testator; and the execution of the conveyance, which was alone wanting to complete the title of the society, took place within a few weeks after the testator's death. No objection, therefore, on the ground of imperfect title in the society, can prevail in this court, provided the intention of the testator to devote the sum of 5,000*l.* to the benefit of the institution, to be expended upon the land given for the purposes of the charity, shall be in other respects sufficiently established. Assuming, then, as for the purpose of this argument, it may be assumed, that the land given by Knight was, at the date of the will, land already in mortmain, it is settled that a bequest of a sum of money to an existing charity, towards building upon land already in mortmain, is a valid bequest. The Vice-Chancellor was himself of opinion that if the testator had said "towards building the alms-houses," the bequest might have been supported, as pointing to the land specifically devoted to that purpose. The institution was founded in October, 1828, and in the following year it was proposed, at a meeting of the members, that alms-houses should be erected for the use of the pensioners of the institution; and, at that meeting, the offer was made by Knight, of the three acres of land, which were afterwards conveyed to the society, for the purpose of erecting the alms-houses. Subscriptions were entered into for the promotion of that object, and a building fund was formed; and it is proved that the testator took an active part in this proceeding, and frequently urged the necessity of proceeding with the alms-houses. There can be no doubt whatever, therefore, if extrinsic evidence may be referred \*to, that, when the testator used the words [\*520] "towards building alms-houses," he had in his contemplation, and meant to refer to the particular alms-houses which were the subject of the resolutions passed at the meeting of the society; and it is indeed admitted by the Vice-Chancellor, that the effect of the strict construction which he felt himself judicially bound to give to the expressions of the testator, would be to defeat his intention. But supposing the intention of the testator to refer to any particular alms-houses not to be apparent on the face of the will, and that there is no latent ambiguity, which entitles us to look out of the will and resort to evidence which would put the testator's real intention beyond all doubt, there are authorities which go strongly to support this bequest, even without resorting to extrinsic evidence. In *Sorresby v. Hollins*,(a)

(a) 9 Mod. 221.

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the first case which occurred after the Statute of G. II, where there was a direction to invest an annuity for a charitable purpose, either by the purchase of real estate or otherwise, Lord Hardwicke supported the gift. The same learned judge was of opinion that a bequest of money to erect a hospital or school-house, might be supported, if the object could be effected by any other means than by a purchase of land, as by an application of the fund upon land already in mortmain, or by a gift of land, or hiring of a house; *Vaughan v. Farrer*,<sup>(a)</sup> *Cantwell v. Baker*,<sup>(b)</sup> *The Attorney-General v. Bowles*.<sup>(c)</sup> There cannot be a stronger proof of the soundness of the principle upon which those cases were determined than that afforded by the present case; because, admitting that the will alone is to be looked to in order to judge whether the gift may be supported without violating the statute, we know *aliunde* that the fact supports the principle laid down by [521] Lord \*Hardwicke, and that the testator actually contemplated a purpose which did not come within the operation of the Statute of Mortmain. In *The Attorney-General v. Tyndall*,<sup>(d)</sup> where the testatrix devised to trustees her freehold and leasehold estates, which she directed them to sell, and out of the moneys arising from the sale to lay out part in the purchase of a piece of ground for erecting and building an alms-house, Lord Northington held that the gift was void. That was a perfectly sound decision, and not at all inconsistent with the principle laid down by Lord Hardwicke in *The Attorney-General v. Bowles* and the other cases, where he held that a bequest of money for erecting a hospital or school-house might be supported. In *The Attorney-General v. Tyndall* there was a positive direction to buy land, and no possibility, therefore, of making the gift consistent with the statute, which possibility constituted the ground of the decisions in which Lord Hardwicke supported the charitable bequests. That distinction was afterwards adverted to, and approved by Lord Northington in *The Attorney-General v. Downing*.<sup>(e)</sup> In *Pelham v. Anderson*,<sup>(g)</sup> Lord Northington appears not to have acted upon the principle which he had previously approved, for he there held that a bequest of money to build and endow a hospital was void under the statute. The grounds of his decision do not appear in the report of that case, which is a brief note extracted from the registrar's book. In *The Attorney-General v. Hyde*,<sup>(h)</sup> Lord Bathurst held that a bequest of a sum of money for the purpose of erecting a free school was void, although there was a piece of waste land in the parish on which a free school had formerly stood; but in that case his Lordship

<sup>(a)</sup> 2 Ves. sen. 182.<sup>(b)</sup> *Ibid.* cited.<sup>(c)</sup> 2 Ves. sen. 547.<sup>(d)</sup> Ambl. 614, and 2 Ed. 207.<sup>(e)</sup> Ambl. 555.<sup>(g)</sup> 2 Ed. 296.<sup>(h)</sup> Ambl. 751.

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was of opinion that the testatrix meant to have a school-house of her own foundation. In *Foy v. Foy*,<sup>(a)</sup> where [\*522] the gift was "for erecting and endowing a hospital for the county of Dorset," Lord Kenyon held that the bequest might go in aid of an existing hospital, and referred it to the Master to inquire whether there was any hospital existing in the county. Upon the same principle, in *The Attorney-General v. Williams*,<sup>(b)</sup> a bequest of personalty to establish a school was held not to be within the Statute of Mortmain, because the establishment of the school did not necessarily involve the purchase of land or building. In *Chapman v. Brown*,<sup>(c)</sup> Sir W. Grant decided that a bequest for building a chapel, where there was no land already in mortmain which the testator could be taken to have in his contemplation, was void, because it could not be presumed that he meant the gift to take effect in case land already in mortmain could be found for that purpose. *Chapman v. Brown* undoubtedly overrules *The Attorney-General v. Bowles*, but it is sufficiently distinguishable from the present case, and leaves untouched the principle, that a bequest for building alms-houses or schools upon land already in mortmain is not within the statute, a principle which has been recognized in all the subsequent cases: *The Attorney-General v. Parsons*,<sup>(d)</sup> *The Attorney-General v. Davies*,<sup>(e)</sup> In *Johnston v. Swann*,<sup>(g)</sup> Sir John Leach held a bequest of a portion of a sum of stock, to be applied in paying the expense of providing for a school-house, to be a valid bequest.

The *Solicitor-General* and Mr. *James Russell*, *contra*.:—The will points out no specific land upon which the alms-houses were to be built; and it is only by matter *\*dehors* the [\*523] will, which the court cannot take into its consideration, that it is attempted to show that this testator had any specific land in his contemplation. It is conceded, by the very nature of the argument on the other side, that there were no alms-houses in existence to the improvement of which the bequest could be applied; and, as no land is mentioned in the will, the case reduces itself to that of a bequest of money for the purpose of building for charitable purposes, which, according to all the modern authorities, is void under the Statute of Mortmain. *The Attorney-General v. Bowles*,<sup>(h)</sup> where such a bequest was held to be good, has been overruled by repeated decisions: *The Attorney-General v. Tyndall*,<sup>(i)</sup> *The Attorney-General v. Hyde*,<sup>(k)</sup> *Pelham v. Anderson*,<sup>(l)</sup> *The Attorney-General v. Nash*.<sup>(m)</sup>

(a) 1 Cox. 163.

(b) 4 Bro. C. C. 526.

(c) 6 Ves. 404.

(d) 8 Ves. 186.

(e) 9 Ves. 535.

(g) 3 Mad. 457.

(h) 2 Ves. sen. 547.

(i) Ambl. 614.

(k) Ambl. 751.

(l) 1 Bro. C. C. 444, note, and 2 Ed. 296.

(m) 5 Bro. C. C. 588.

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It is supposed to be a ground for reversing the decision in the present case, that the Vice-Chancellor was himself of opinion that the bequest might have been supported, if the testator had used the words "building *the* alms-houses;" but the word *the* would have made a most material difference, as it would have let in extrinsic evidence for the purpose of showing whether the intention of the testator, as indicated by the words used in his will, was or was not a lawful intention. Upon the face of the will there was nothing ambiguous, and nothing to show that the testator had land already in mortmain in his contemplation. Nor was there, in point of fact, any land already in mortmain; for the land, supposed to be in his contemplation, was not conveyed until after the death of the testator. Even if the extrinsic evidence [\*524] were admissible, the land must have been actually \*in mortmain at the death of the testator to give validity to this gift: *Ingelby v. Dobson*; (a) and the mere intention, on the part of Knight, to give a piece of land to the charity, which intention he might at any time have altered, and which was not, in fact, perfected till some weeks after the testator's death, could not possibly have any effect, legal or equitable, upon this bequest.

Sir William Horne, in reply.

November 13th.—THE LORD CHANCELLOR:—The facts of this case are few, and not in dispute. In the year 1828, the principal butchers in London and Westminster formed a charitable society for the relief of their widows and decayed members, and the plan originally was to allow only pensions out of their funds. Next year, however, they determined to add alms-houses, and with that view John Knight, one of their number, announced his intention of conveying to them a piece of ground at Farnham Royal in Berkshire; he also put them into immediate possession, so that from 1829 the building fund committee of the society received the rents and profits of the land. On the 14th of June, 1831, John Jay Graves, also a member, made and published his will, by which he "gave and bequeathed to the Butcher's Charitable Institution the sum of 5,000*l.* towards building alms-houses to the said institution." He died on the 28th of November in the same year, and a month after that, on the 28th of December, 1831, the conveyance of the land at Farnham Royal, by Mr. Knight to the institution, was executed by bargain and sale, afterwards enrolled according to the provisions of the 9 [\*525] G. II, c. 36, \*commonly called the mortmain act, as being the last of that class. The question raised below,

(a) 4 Russ. 34<sup>o</sup>.



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and brought here by appeal from his Honor, the Vice-Chancellor, is whether the bequest of Mr. Graves was void by that act.

The words of the act confine its invalidating operation to devises of lands, tenements and hereditaments, or of money and other personalty to be laid out in purchasing lands, tenements or hereditaments, or incumbrances upon the same; and it must be admitted that there is no provision against bequests to be laid out in building or erecting buildings, unless in so far as these may come within the description of purchases of lands, from the impossibility of building without land. It has been doubted whether or not this omission be intentional or accidental; some contending that, inasmuch as the object of the act was to prevent property being placed *extra commercium*, the legislature must have intended to prevent large sums being locked up in building upon land held in mortmain, independently of the will by a prior title, or by another contemporaneous conveyance, duly executed according to the provisions of the statute; while others hold that the only object was to prevent land from being placed *extra commercium*, and that no intention existed of preventing land already in mortmain from being improved; on the contrary, one of the main objections to mortmain, its tendency to obstruct the improvement of the soil, would thereby be removed. I am of the latter opinion, both upon the reason of the matter, and because the last mortmain act refers in the preamble, to real property alone, citing the twenty-third chapter of Magna Charta, and the other older mortmain statutes, which were made upon the mere feudal principle of protecting the lords against having tenants, who never died, imposed upon them. Placing land in mortmain is, therefore, the object \*against which the [\*526] act is pointed; but then money is equally forbidden to be devised for the purpose of buying land, because that would indirectly put the land purchased in mortmain. So, charitable bequests to be invested in real securities, are equally forbidden, in consequence of their tendency to bring land by foreclosure into the perpetual ownership of a corporate mortgagee.

It cannot be denied that the current of the decisions during the early part of the period that has elapsed since the act was passed, set in against the act, and gave birth to a restrictive construction favorable to mortmain, upon some mistaken view of encouraging charity, although certainly no one felt more, or has more severely commented upon the evils of improvident charity than Lord Hardwicke himself has done in *The Attorney-General v. Day*; (a) and *The Attorney-General v. Graves*; (b) yet *The Attorney-General v. Bowles*, (c) and other cases, now no longer law, stretched the exception, in order to take bequests out of the statute, which

(a) 1 Ves. sen. 218.

(c) 2 Ves. sen. 547.

(b) Amb. 155.

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have since been held to be within its purview as they are clearly within its mischief. Nor does it seem possible to reconcile, as was attempted in *The Attorney-General v. Downing College*,<sup>(a)</sup> the decision of Lord Northington in *The Attorney-General v. Tyndall*,<sup>(b)</sup> with that of Lord Hardwicke in the *Attorney-General v. Bowles*.

On the other hand no one can doubt that the doctrine which Lord Northington laid down in *The Attorney-General v. Tyndall*, though not the decision itself, is contrary to law. When he states it to be as clear as any proposition in Euclid, that the [\*527] mortmain act \*prohibits not merely bequests for the purchasing of lands, but also all realizing for the benefit of a charity; and expressly adds, to leave no doubt as to what he meant by realizing, that, but for such prohibition, 20,000*l.* might be laid out in building upon land not worth 50*l.*,<sup>(c)</sup> it is quite clear that his Lordship stated what was not law, for no one can think of maintaining that a bequest of money to be laid out in building on land already in mortmain, or which might be acquired in aid of a testator's charitable purpose, through independent and valid titles, is struck at by the statute. This erroneous doctrine cannot, I fear, be rejected from the judgment of Lord Northington on the ground of error by the reporter; for Lord Henley, in his excellent edition of his ancestor's judgments, states that this case is in Lord Northington's own handwriting; and he only corrects the earlier portion of the report in Ambler, where Lord Northington is most absurdly, and, as it appears, without the least warrant from his own manuscript, made to say, that the Master of the Rolls was bound by the authority of the Lord Chancellor, but that he (Lord Northington) felt only one authority, that of the House of Lords, which was a superior court, no other authority having any influence on his judgment.<sup>(d)</sup>

The first position which I am justified by the cases in laying down, nay, by the whole authorities together called upon to lay down, is this, that a bequest of money or other personalty to any charitable institution to build or erect buildings, taken by itself, is within the statute. This seems plainly the good sense of the thing; for when I give any one 1,000*l.* to build a house with, and say no more, it is plain I imply that he should lay [\*528] it out in buying land, and building \*upon that land.

Accordingly the cases hold that such a bequest without more is void under the act; nor can any words be stronger to this effect than those used by Lord Eldon in *The Attorney-General v. Parsons*,<sup>(e)</sup> and *The Attorney-General v. Davis*.<sup>(g)</sup> In the former case he says, "that the good sense is with the later cases,

(a) Amb. 550.

(b) Amb. 614, and 2 Ed. 207.

(c) 2 Ed. 214.

(d) Ambl. 616.

(e) 8 Ves. 191.

(g) 9 Ves. 544.



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requiring that the testator himself should have manifested his purpose to be sufficiently answered if they could hire or beg land." And he afterwards says that he has reason to know "it was Lord Thurlow's opinion that, if a testator directs a school to be built and does not advert himself, by words in his will, to a purpose that the land is to be acquired otherwise than by purchase, you ought to infer that he meant it to be acquired by purchase, and then it will not do." So in *The Attorney-General v. Davies*,<sup>(a)</sup> he expressly says "whatever were the decisions formerly, when charity in this court received more than fair consideration, it is now clearly established, and I am glad it is come back to some common sense, that unless the testator distinctly points to some land already in mortmain, the court will understand him to mean that an interest in land is to be purchased, and the gift is not good." I consider the decision of Lord Bathurst in *The Attorney-General v. Hyde*,<sup>(b)</sup> to be a case to the same effect. In that case the circumstances were very strong for presuming, if presumption had been admissible, an intention to direct the building on land already in mortmain; for it was a bequest to trustees, among whom the minister and churchwardens were included, to build a school-house in the parish, and there was land in the parish on which a school-house had once stood, that land being in mortmain.

\*The next position which I deduce from the authorities [529] is, that, though the testator's intention to confine his bequest to a mere building, is best gathered from his own words in the will, yet we have a right to look at the whole circumstances of the case, because if these be such as to leave no doubt of the meaning which he had, and that the bequest was to build only upon land already in mortmain, or which should be acquired by other means than the legacy, then the provisions of the act do not apply. It seems, at first sight, as if the authorities to which I have referred were opposed to this extension, and prevented us from looking to matter *dehors* the will; for the language of Lord Eldon, and the opinion he cites from Lord Thurlow, are strong to confine us within the four corners of the will. But Lord Bathurst plainly went out of the will in *The Attorney-General v. Hyde*<sup>(c)</sup> and took into consideration the fact of land being in mortmain, under the control of the trustees, and of a school having formerly stood upon it. Indeed he states those facts *dehors* the will, as forming the distinguishing feature of the case; and a case may be imagined where no doubt could exist as to the testator's intention, though not apparent on the face of the will; for example, a bequest to trustees to build in the parish of A., and all the land except one acre in that parish in settle-

<sup>(a)</sup> 8 Ves. 544.<sup>(b)</sup> Ambl. 751.<sup>(c)</sup> Ambl. 751.

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ment, being, we may suppose, to make it stronger, estate tail, with reversion in the crown, so that the remainders could not be barred without an act of Parliament, and the one excepted acre in mortmain, and the testator himself a co-trustee and also tenant in tail of the settled lands, consequently conusant of the state of the title of the lands in the parish. Here the presumption would be too violent to be resisted, that the testator could only  
 [\*530] \*intend a bequest to build with his legacy on the land already in mortmain; indeed no words he could have used could add to the evidence of such being his intention. In these cases we do not admit evidence *dehors* to give a meaning, or discover the intention of words used, but only place ourselves in the situation of him who made the instrument, by enabling ourselves to suppose we are in the circumstances in which he stood.

Again, if we take the words of Lord Eldon literally in *The Attorney-General v. Davies*, they seem to confine the exception to cases where the land to be built upon is already (that is at the date of the will or at least at the testator's death) in mortmain. But the reason of the matter extends this also to cases where the testator may plainly appear to have in contemplation, a future acquisition of building land otherwise than by means of the legacy; and Lord Eldon clearly assumes this in what he says in the other case I have referred to, *The Attorney-General v. Parsons*, where he speaks of hiring or begging land.

I must, however, add this further position in limitation of the former—that the *onus* of showing that the intention of the testator was restrained within lawful limits, is upon the party seeking to take the bequest out of the statute; and that in one way or another, but especially where it is to be by matter *dehors*, that is by considering to what circumstances the instrument was applied, the intention must appear absolutely certain and clear to exclude the employment of the fund in purchasing land, and must not be a matter of speculation or conjecture. We may add, further, that where the purchase of land, or otherwise obtaining  
 [\*531] land to \*build upon, is the fact relied upon, the circumstance of the land having been actually purchased by and vested in the legatees, must always be a great deal more powerful than any expectation possibly can be: I mean where the words used do not apply directly to such land, and we only gather the intention from the fact of a purchase actually made or in progress or contemplation.

These positions, which appear warranted both by principle and authority, lead us to an easy determination of the present question.

The bequest is of money to a charitable institution, towards building alms-houses without more. This *prima facie* is a be-

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quest for buying land and building upon it, nor does the word *towards* make any difference; it only indicates that the legacy was intended to increase a fund already begun, or intended to be formed for that purpose; and something must therefore be shown *dehors* the will, something in the circumstances to which the testator must be understood to refer, and necessarily to refer; something which leaves no doubt at all that he did not mean the money to be used in buying land, but only in building houses. Now the only thing relied on with this view, is the fact of Mr. Knight having previously given a piece of land upon which it is said the alms-houses might be built. Even if the fact had been so, would it prove more than that Mr. Graves' money might be used in building on the land so given; that is, would it show more than a possibility of the money being used in building without purchasing? More than this it could not prove; for no one can maintain that the existence of such land in the possession of the institution, precluded the application of the legacy to the purchase of other building land; and \*it is equally [\*532] certain that the words of the bequest would amply have justified such further acquisition of land, independent of Mr. Knight's land altogether. Indeed there is much weight in the argument that the building on Mr. Knight's land would have been a more questionable use of the fund than buying more land whereon to build. Therefore it is clear, in any view, that the having such a piece of land already did not at all tie the trustees down to building upon it. But if it did not, the conclusion follows irresistibly, that a course of conduct on the part of the legatees which was far from necessary, and was only one of two kinds of proceeding equally open to them, was not necessarily in the testator's contemplation, and, therefore, that we can have no right to read his bequest as if it were not towards building alms-houses generally, but towards building them upon land already in the possession of the institution. So it would stand if the conveyance had actually been made of that land prior to the will.

This inference, however, is greatly strengthened, when we consider that this is by no means the case. The land had not been conveyed; the institution, by Mr. Knight's sufferance, stood in the situation of tenants at will to him, and he had only let them into possession in the intention of making a merely voluntary conveyance to them, which intention was unexecuted till five months after the date of Mr. Graves' will, and one month after his decease. Mr. Knight might during all that time, nay, after the death of the testator, have altered his intention; or creditors, or the bankrupt laws, might have interposed to interrupt the execution of his design. In the *Attorney-General v. Hyde*, (a) the

(a) Amb. 751.

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land was actually in mortmain, and in the ownership as [\*533] well as occupation of the \*parties entrusted with the legacy to build a school—nay, a school had once stood upon it, and yet Lord Bathurst decreed it to be a bequest to buy other land, because he did not think that fact sufficient to show an intention of building on the parish land, thinking it on the whole more probable that the testatrix designed to found a school of her own. Surely we may consider it as probable here, that Mr. Graves did not intend to make the execution of his benevolent design, with respect to so considerable a sum, depend upon the many accidents which might intervene to prevent the transfer of Knight's land into the ownership of the institution. Who can doubt that if any one had said "you mean this 5,000*l.* to be used in building on the present land at Farnham Royal," he would have answered "Aye, or any other land you can conveniently buy with part of the money." He had said nothing at all to exclude that supposition, and the facts do not prove in the least degree that he did not contemplate it. Indeed the institution held Knight's land under a power of selling it when and as they should please. The price would have gone to the building fund, and then Mr. Graves' legacy becomes a gift to a fund, part of which must be vested in the purchase of land in order that the rest might be used in building; and neither by the words of the will, nor by the facts of the case, is there any kind of restraint imposed which should direct the use of the legacy towards the one purpose rather than the other, if it once found its way into the fund.

I am, therefore, of opinion that his Honor, the Vice-Chancellor, has come to a sound conclusion upon the subject, and that the decree dismissing the bill must be affirmed, but without any costs. The question was a very fit one to be brought here, and the institution would not have discharged its duty had [\*534] it not come \*forward to claim the legacy. I further consider that the next of kin have, by the decision, obtained a fund contrary to the intention of the testator, and in consequence of his ignorance of the law, and of his omitting expressions, which, had he known the law, he would assuredly have inserted in his will. The charity, and not the next of kin, were intended to be benefited; and therefore I give the costs out of the fund.

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THE ATTORNEY-GENERAL v. THE CORDWAINERS' COMPANY.

ROLLS.—1833: 16th December.

Where a testator devised certain estates to the Cordwainers' Company for the interest, use and performance of his will; and gave a moiety of the rents to his brother

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for life, and out of the remainder of the rents directed certain specified payments to be made to charitable purposes, and to the officers of the company, with a gift over to his brother in fee, if the company should neglect to perform his will; it was held, that the company took a beneficial interest in the rents of the estates, subject to the payments of the specified sums for charitable purposes; and an information seeking to have the whole augmented rents, or a proportional part of them, applied to purposes of charity was dismissed with costs.

JOHN FYSHER, by his will, dated the 31st of March, 1547, after bequeathing certain legacies to charitable and other purposes, proceeded to devise as follows:—"I do give and bequeath by this my present testament and last will unto the master, wardens, fellowship and company of the craft or mystery of cordwainers within the city of London, and to their successors forevermore, all that my house called the sign of the Falcon, with all the tenements, as well on the street side as upon and within the back side, to have and to hold the same, with the appurtenances thereto belonging, situate on the south side of St. Dunstan's parish church in Fleet street, for the only interest, use and performance of this my last will and testament in manner and form following; that is to wit, first, I will that the said master, wardens, fellowship and company, and their successor's shall \*without contradiction, suit or delay, peaceably, [\*535] gently and quietly pay, or cause to be paid to my brother, David Fysher, of the town of Shrewsbury, one annuity or yearly rent of 6*l.* sterling yearly during his natural life, to be paid to him at four usual terms in the year, that is to say, &c., Also I will that the said master, wardens, &c., immediately after the decease of the said David Fysher, shall pay, or cause to be paid to Mary Fysher, wife of the said David, one annuity or yearly rent of 40*s.*, to be paid at two terms of the year, that is to say, &c., to continue during her life, if the said Margaret do overlive the said David Fysher, her husband; and that they and their successors shall yearly distribute and bestow in alms within the parish of St. Dunstan's 5*l.* sterling, by 12*d.* a house, to every poor householder, and to such as shall be most needy and poor, by the discretion of the churchwardens of St. Dunstan's, and the overseers of this my last will and testament. And I also will that the said master, wardens, &c., and their successors of the Company of Cordwainers, shall yearly, forever, cause a dirge or mass to be sung in the said parish church of St. Dunstan's for my soul, my friends' souls, and all Christian souls. And I will that the said masters and wardens of the craft aforesaid, shall yearly distribute and bestow in alms among poor people, strangers and others coming out of other places and parishes, the sum of 6*s.* 8*d.* And I will and direct that all such as be master and wardens, or shall be of the said craft of cordwainers, shall be present at my dirge and mass, and at the distribution of the said alms, so that the said master shall have for his painstaking, and

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each of the wardens for their painstaking, once in the year to be done, 10*d.* apiece. And I also will that every one of the churchwardens of St. Dunstan's in the west aforesaid, being present at the same distribution, shall have 12*d.* apiece yearly for-  
 [\*536] ever. And after certain other directions, and \*a devise of certain estates therein mentioned to the said David Fysher, with remainder to Nicholas Parnell in fee, subject as to such remainder in fee to the payment of 4*l.* a year for the charitable purposes therein mentioned, and after giving certain other pecuniary legacies, the testator proceeded as follows:—"And all the residue of my goods not bequeathed I hereby give and bequeath to David Fysher, my brother, whom I make my sole executor of this my last will and testament. And I admit for my overseer and supervisor Robert Fleetwood, being of the King's High Court of Chancery; provided always, that if the said master, wardens, fellowship and company of the craft or mystery of cordwainers aforesaid, do not well and truly perform, fulfil and keep all and singular the thing and things above said by them to be observed, performed, fulfilled and kept, but do cease in doing of the same by the space of one year, contrary to this my last will and testament, that then it shall be lawful for my said brother, David Fysher, and his heirs, into all the said lands, tenements and other the premises with the appurtenances to enter, and the said premises to keep, have, hold and enjoy, to him, his heirs and assigns forever; and the said master, wardens, fellowship and company, to be clearly expelled, discharged and put out of the premises."

The estate devised to the company consisted, at the date of the will, of the Falcon Inn, let at a yearly rent of 6*l.*, and two other messuages, let respectively at rents of 5*l.* and 1*l.* 6*s.* 8*d.* The annual rental had increased to the sum of 358*l.* The company distributed the sums of 5*l.* and 6*s.* 8*d.* annually among the poor of the parish of St. Dunstan's and other poor, as directed by the will; and they also paid some other small sums, amounting in the whole to 2*l.* 17*s.* 6*d.*, to the minister, churchwardens  
 [\*537] and officers of the parish, and, after \*making such payments, they applied the surplus of the rents to the general corporate purposes of the company.

The information prayed that the Cordwainers' Company might be declared to be trustees of the rents and profits of the messuages and premises devised to them; that an account of the rents might be taken against the company, and that the surplus rents might be applied in augmentation of the sums of 5*l.* and 6*s.* 8*d.* given to the charitable uses and purposes mentioned in the will, either in the whole or rateably with the other sums mentioned therein; or that some other proportional or reasonable augmentation of the sums directed to be paid for charitable purposes

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might be made out of the increased rents, in performance and advancement of the charitable intentions of the testator; and that a proper scheme might be settled by the Master.

The defendants, by their answer, insisted that they were devisees of the estates in question, subject only to the payment of the fixed and limited sums which the testator had directed to be paid; and that they had a right, as their predecessors had always done, to apply the surplus rents to the uses and purposes of the company.

Upon the construction of the will two questions were raised; first, whether the testator intended to devote to charitable purposes the whole income of the estates devised to the company; secondly, if the whole income were not so devoted, whether the objects of the charity were entitled to an increase in the sums given to them, proportioned to the amount of the increased rents.

Mr. *Bickersteth* and Mr. *O. Anderdon*, in support of the information, contended that the frame and language \*of [\*538] the will showed the testator's intention to devote the whole of the property devised to the company to charitable purposes, with the exception of the sums given to the officers of the company, which were given for services to be performed; and that, with that exception, the company took no beneficial interest whatever under this devise. Why should those small sums be given to the company, if the testator intended to give them the whole surplus? It was immaterial that the annuity of 6*l.*, after the death of the testator's brother, and the reservation in favor of the widow, was not expressly disposed of, because the general charitable intent, deducible from the language of the will, rendered such an express disposition unnecessary. The whole rents of an estate might be devoted to specific charitable objects, as in *The Thetford School case*,<sup>(a)</sup> and that furnished a strong indication of the testator's intention to devote the whole property, be its future increase what it might, to charity; but that intention might be collected from any other indications on the face of the will. In the *Mercers' Company v. The Attorney-General*,<sup>(b)</sup> by a deed executed in 1616, certain premises, then let upon lease at a rent of 150*l.*, were conveyed for a nominal consideration to persons therein named; and, by another deed of the same date, it was declared that the grant in the former deed was upon trust to pay the rents to the *Mercers' Company*, and that the company should dispose of the moneys to various specified charitable uses, among which was a donation to the poor brethren of the company. These charitable gifts did not exhaust the exist-

(a) 8 Co. 130.

(b) 2 Bligh, (N. S.,) 165.

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ing rent of 150*l.*, there being a surplus of 9*s.* remaining in the hands of the company; and yet it was held that the company were trustees of the rents and augmented rents, and that

[\*539] the surplus was \*applicable, in proportion to the increased rents, to the payments directed by the deed. In that case it was argued that, as the whole of the income was not entirely exhausted, the company were to be considered as trustees for the payment of the particular sums only, and that they took a beneficial interest in the surplus. That argument, however, was unsuccessful in the Court of Exchequer, and it was equally unsuccessful when the case was afterwards brought, upon appeal, before the House of Lords. No similar argument could prevail in this case, if the court should be of opinion that the general intent of this testator was to devote his property to charity. In the present case there was only a remaining sum of 13*s.* 6*d.* out of the rents existing at the date of the will, out of which sum the cost of a dirge and mass was to be paid, so that the whole rents might reasonably be considered as having been exhausted, and the case would fall exactly within the principle upon which the case of *The Mercer's Company v. The Attorney-General* was decided. But even if the court should be of opinion that the testator had not devoted the whole income of his property to charity, still the objects of his charitable bequests were entitled to an increase of the sums directed to be paid to them, proportioned to the amount of the increased rents.

Mr. *Pemberton* and Mr. *Wakefield contra.*—This is one of the class of informations against companies, of which so many have recently been instituted, after the affairs of those companies had been fully examined by the special commissioners appointed by the legislature—instituted without the slightest regard to the interests of charity, or the benefit of the public, but solely with a view to costs. The information has received the signature of the Attorney-General; but it is impossible \*that

[\*540] it could have received the deliberate sanction of that officer. No case can be found in which the court has applied the whole property of a testator to charitable purposes, unless the testator has expressly given it to such purposes, or his intention so to devote it is matter of necessary inference from the language or dispositions of the will. There are two classes of cases in which the intention of the testator to give his whole property to charity is inferred; first, where there is a general declaration of his charitable intentions in the outset of the will, in which case the court fastens upon the general declaration, and affixes a trust upon all that part of his property which is not specifically disposed of. Another class of cases is where there is no such general declaration, but every shilling of the existing income is specifi-



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cally devoted to charitable purposes. On the other hand, where there is no such general declaration, and where there are charitable bequests which do not exhaust the whole of the income, there the charity will take what is given to it, and no more. These principles are established by the leading authorities on this subject: *Thetford School case*,<sup>(a)</sup> *Arnold v. Attorney-General*,<sup>(b)</sup> *Attorney-General v. Mayor of Coventry*,<sup>(c)</sup> *Attorney-General v. Johnson*,<sup>(d)</sup> The only case which at all militates against these principles—and even that case is not wholly incapable of being reconciled with them—is *The Attorney-General v. Sparks*,<sup>(e)</sup> which is noticed by Lord Eldon in the *Attorney-General v. The Mayor of Bristol*,<sup>(g)</sup> as being very ill reported. The two cases cited on the other side are so far from furnishing an exception to these principles, that they fall within both the rules laid down for inferring the \*intention of the testator. In [\*541] *The Mercers' Company v. The Attorney-General*, the deed by which the company were constituted trustees, required not only all the existing rents to be applied to the purposes of the will, every one of which purposes was a charitable trust, a circumstance which entirely distinguishes that case from the present. In the *Thetford School case* there was a specific appropriation of every shilling of the rents to charitable purposes; and in the *Mercers' Company* and the *Attorney-General* there was only a sum of 9s. unappropriated.

As to the other point raised by this information, that payments directed to be made to the objects of the charity ought to be increased in proportion to the increase of the rents, those payments are to be considered as a charge upon the estate, and it is against all the authorities to contend that the persons entitled to the charge are also entitled to derive a benefit from the increased value of the estate. In *the Matter of Jordeyn's Charity*,<sup>(h)</sup> where estates were devised to the Fishmongers' Company, subject to a charge, to distribute among the poor 138 quarters of coals, or else money to buy the same, at 8d. a quarter, the Vice-Chancellor held that it was optional with the company either to distribute the coals, or the money at the specified price, and that decision was affirmed on appeal.

Mr. Wray for the Solicitor-General, who was made a party to represent the interest of the crown, in default of an heir, submitted that the testator's brother being appointed by the will residuary legatee of all his goods, which word "goods" would

(a) 8 Co. 130.

(b) Show. P. C. 22.

(c) 2 Vern. 397, and 7 Bro. P. C. 235, Toml. edit.

(d) Amb. 190.

(g) 2 Jac. &amp; W. 320.

(e) Amb. 201.

(h) 5 Sim. 571, and 1 Mylne &amp; Keen, 416.

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[\*542] not pass the surplus rents, \*there was a resulting trust of those rents to the heir, and, in default of an heir to the crown.

Mr. *Bickersteth* in reply.

THE MASTER OF THE ROLLS:—The first question is, whether this testator intended the corporation to take as mere trustees, or whether he intended to give them any beneficial interest. The next consideration is whether, if the corporation were to take as trustees, they were to be trustees for mere charitable purposes.

It does not appear to me that the words of this devise, do constitute this corporation mere trustees. The estate is absolutely given to them; not upon trust, but for the use, interest and performance of the testator's will. It is rather a gift upon condition, than a gift upon trust. They are to take the estate so devised to them, upon condition that they perform the duties which by the terms of the will are imposed upon them. Those duties are not for mere charitable purposes. Half the property that this testator disposes of, is disposed of to his brother; an annuity of 6*l.* is given to his brother for his life; and after his brother's death there is no disposition of this annuity, except that 2*l.* a year are given to his widow if she survived him. These are not charitable purposes. It is plain that a beneficial estate was intended to be given to the Cordwainers' Company, because the testator expressly declares that, if the condition upon which this estate is devised to the corporation be not performed, the brother shall enter and defeat the estate given to the Cordwainers' Company. Defeat what estate? An estate given to them in mere

trust, from which they were to derive no benefit? Is it [\*543] to be supposed that \*this was considered by the testator in the nature of a penalty? The imposition of a penalty for non-performance of the condition implies a benefit, if the condition be performed, and is inconsistent with any other intention than that the testator meant to give a beneficial interest to the company upon the terms of complying with the directions contained in his will. There is, therefore, no trust either express or implied for charitable purposes, further than to the extent of the special charge imposed; and, upon all the principles applied in this court to such a case, this information must be dismissed.

The most important consideration is, whether the information should not be dismissed with costs. I regret that the name of the Attorney-General has been used on this occasion; for I cannot but suppose that, if the attention of the Attorney-General had been sufficiently called to the case, he would not have sanctioned this proceeding by his name. It is true that his name is used; but, considering the merits of the case, or rather its demerits, I must dismiss this information with costs.

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1834.—*The Attorney-General v. The Governors of Atherstone Free School.*

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**\*THE ATTORNEY-GENERAL v. THE GOVERNORS OF [544]  
ATHERSTONE FREE SCHOOL.**

1834: 20th June and 8th August.

Jurisdiction of the court in regulating the management of free schools, and controlling the conduct of the schoolmasters of such charitable foundations.

Before the Statute of 1 W. & M. c. 21, a commission of charitable uses could not be issued by Commissioners of the Great Seal. A decree of commissioners of charitable uses made during the Commonwealth in 1649, when there was no Lord Chancellor or Lord Keeper, was, therefore held, upon appeal, to be a nullity.

THE information and bill were filed by the Attorney-General, at the relation of William Bradley, and by William Bradley, against the governors of Atherstone Free School, and prayed, in substance, that the rights and duties of the relator and plaintiff as schoolmaster of the free school might be ascertained, that he might be declared to be entitled to the surplus rents and profits after deducting the expenses of the management of the charity; that an account might be taken of the rents and profits received by the defendants, the governors of the free school, since the 21st of March, 1817, and that if their receipts should be proved to have exceeded their expenditure, they might be decreed to pay the balance to the relator and plaintiff. By the decree made at the hearing of the cause on the 12th of December, 1827, it was referred to the Master to take an account of the rents and profits of the estates belonging to the charity received by the defendants; to inquire and state to the court what were the rights and duties of the schoolmaster, and to settle a scheme for the management of the charity. The Master made his general report on the 8th of February, 1832. The defendants took seven exceptions to that report, which were heard on the 25th of April, 1832, before the Master of the Rolls, who overruled four of those exceptions and allowed the rest. From his Honor's decision as to the four exceptions which were disallowed, the defendants presented a petition of appeal to the Lord Chancellor. The nature of the exceptions is fully stated in his Lordship's judgment.

\*Mr. *Knight* and Mr. *Cooper* for the appellants. [545]

The *Solicitor-General* and Mr. *James Russell* contra.

THE LORD CHANCELLOR:—In this case, by letters patent of the 15th year of the reign of Queen Elizabeth, after reciting gifts of money to be laid out in land for the support of a school at Atherstone, in the county of Warwick, it was ordained that there should be twelve men of Atherstone, to be called governors and keepers of the possessions of the charity, and they were thereby incorporated and power was given to them of choosing a school-

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master, and making regulations respecting his conduct and stipend. In the year 1607 the governors of the school, who had been appointed under that foundation, made certain orders and regulations in exercise of their authority, whereby it was ordered that the produce of the charity lands, above the sum of 220*l.*, should, after defraying the necessary expenses, be kept by the bailiffs, (who were the collectors of the rents,) for contingencies, for the term of twenty-one years; and other directions were thereby given, such as that the Master should keep one key of the chest, and so forth.

In the year 1649, by a decree of the Commissioners of Charitable Uses, the rents of the charity lands were adjudged to be for the support of the school and of the schoolmaster, and a feoffment made of the land was declared to be illegal. The rents were at that time only 28*l.* 6*s.*, of which 20*l.* were paid to the Master. In the year 1669 another decree was made, and a pasture called the Moor was declared to belong to the schoolmaster of the school. It appears that the decree in 1649 was strongly opposed by the governors of the school, and they took [\*546] \*exceptions to it, and treated it throughout as illegal and invalid for a reason I shall afterwards advert to.

Mr Bradley was elected master of the school in 1817, when he signed an agreement with the governors to accept a stipend of 110*l.* a year, and to follow certain regulations prescribed by the governors. A similar agreement had been signed by his predecessors, and it had been stated, in the advertisement which announced the election, that the master would be expected to sign such an agreement. Differences afterwards arose between Mr. Bradley and the governors, and owing to those differences, the school has not prospered, for there are only two boys on the foundation. This falling off is ascribed by the trustees to the conduct of Mr. Bradley. The object of this information was to obtain for Mr. Bradley the surplus rents of the premises, and to set aside the agreement of 1817. The Vice-Chancellor referred the whole matter to Master Cross, who reported in favor of the schoolmaster. Exceptions were then taken, most of which have been overruled. The cause has been before the Vice-Chancellor and the Master of the Rolls, who appear to have concurred in the opinion that the master had made out his claim.

This is an appeal against such decision; but what I have now chiefly to dispose of, is the appeal from the judgment of the Master of the Rolls, on the exceptions taken to the Master's report. Those exceptions are seven in number. Four of them have been overruled; three were allowed, and as to those three there is no appeal. The four that were overruled are the subject of present consideration; and in order to form an accurate judgment of

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those four, and especially of the first, it is necessary to look at the decree of his Honor, which referred the matter to the Master.

\*The decree was that it should be referred to the [\*547] Master in rotation, to inquire and state to the court what estates there were belonging to the charity in question in this cause, and at what rents the same were let respectively; and that the Master should take an account of the rents and profits of the said estates received by the defendants (the governors) and by John Hincks, and by any or either of them, or by any other person or persons by their, or any or either of their order, or for their or any or either of their use; and that the Master should inquire and state to the court, what the rights and duties of the schoolmaster of the free grammar school of William Devereux, Thomas Fulner and Amias Hill, in the pleadings mentioned, were; and the Master was to approve of a proper scheme for carrying the trusts of the charity into execution; and any of the parties were to be at liberty to lay proposals before the Master for that purpose; and it was ordered that the defendants and governors should pay to the complainant, William Bradley, out of the balance admitted to be in their hands on account of the said charity estates, and the future rents and profits of the said estates, the arrears of the said salary of 110*l.*, and his said salary in future, as the same should become due, until the further order of the court; but the same was to be without prejudice; and the Master was to be at liberty to state any circumstances specially to the court, at the request of either parties. And the defendants, by their counsel, undertaking not to put the bond in the pleadings mentioned, dated the 19th of June, 1817, in suit, the said bond was not to be put in suit until the further order of the court; and the parties were to produce before the Master, upon oath, all books, papers and writings in their custody, and were to be examined upon interrogatories as the Master should direct, who, in taking the accounts, was to make to the parties all just \*allowances; and further directions and costs [\*548] were reserved, and any of the parties were to be at liberty to apply specially.

The Master, first of all, made a separate report on the rights and duties of the schoolmaster, finding in substance that the schoolmaster was entitled to the house and school-house rent free, and to the whole surplus rents and profits of the charity, after paying the expenses attending the support and maintenance of the charity and other expenses, according to the statutes and orders made by the governors; and that it was his duty to teach grammar to the boys and young men at the school, subject to the rules and orders made, or to be duly made by the governors.

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To this separate report the defendants took an exception, contending that the schoolmaster was only entitled to such proper and reasonable salary as the governors, at his nomination, might agree to give him, and to the use of the house and school at a nominal rent, if any, as well as to five acres of the Moor, lately fenced off, but the latter at the pleasure of the governors, according to an order duly made in 1780; and the defendants denied the authority of the decrees of 1649 and 1669.

On this exception his Honor referred it back to the Master to review his separate report as to the schoolmaster's rights, taking into consideration the fitness of the governors retaining in their hands, a reasonable portion of the rents for repairs and contingent expenses, the residue going to the schoolmaster, and the defendants' deposit was ordered to be returned. The Master then made his general report that 200*l.* was a fit sum to be retained by the governors for the year 1831, and 60*l.* for every future year; that 25*l.* ought to be laid out to accumulate [\*549] and form a fund for the contingent expenses \*of necessary buildings, and that the surplus yearly income, after such deductions, should go to the schoolmaster. He further approved of a scheme, which is, in substance, to this effect—that there shall be twelve keepers or governors resident at Atherstone; that vacancies in the body by death, resignation, or non-attendance at meetings for one year, shall be filled up by a majority or the other governors out of residents at Atherstone; and if the vacancy be not filled up in six months, that the Bishop of Lichfield and Coventry, who is the diocesan, shall nominate; that a bailiff or receiver shall be chosen from among the governors by themselves; that the schoolmaster shall be chosen by the governors, and, in default of them, by the bishop.

To this report the defendants took exceptions, upon four of which they have appealed from the judgment of the Master of the Rolls.

The first of these exceptions was founded on the circumstance of the Master having omitted to consider the state of facts and three several affidavits carried in on the part of the defendants, as well as the bond and agreement entered into with the schoolmaster in the year 1817. His Honor overruled this exception; and I am of opinion that he came to a right conclusion. The state of facts and the affidavits related to the schoolmaster's conduct; and this formed no part of the matters referred to the Master for his consideration, either by the original decree, as I have stated it, or by the order referring it back on the exception taken to the separate report. At the same time the whole substance of the facts stated in the documents that were rejected, was in another shape brought before the court by the depositions; so

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that, in truth, no light has been shut out by the course  
 \*which the master took, and of which his Honor ap- [\*550]  
 proved.

The second exception is of more importance. It applies to the scheme approved by the Master, and rests on this ground, that no power of removing the schoolmaster or controlling him—no authority over him—is given to the governors, who are merely to choose him, and, after that, he is to be independent of them and of every one else.

I am of opinion that, if the other parts of the scheme are to stand without any alteration, the visitatorial power is rightly withholden from the governors. Those governors are necessarily tradesmen of Atherstone, highly respectable in their stations, no doubt, and very fit to be entrusted with the management of the school's pecuniary affairs; but not the fit persons to exercise the delicate office of visiting a learned institution. The visitatorial power is discretionary and absolute. It is exercised in private, without any hearing of parties in the presence of each other, as in a cause; nor have the courts of law ever interfered, further than to put the power in motion, and there leave it; insomuch that even as to the manner of hearing a party subject to the power, the visitor has always been left to determine for himself in what way he shall hear, and to hold that a hearing, which, in any other case, could hardly, with any accuracy, receive such a name. These things are so familiar, that no authorities need be cited for them; but the reasoning of the Court of King's Bench in the celebrated case of *Dr. Povah* in the year 1811, reported under the name of *The King v. The Archbishop of Canterbury*,<sup>(a)</sup> strongly illustrates the absolute nature of a visitor's discretion.

\*Now can it be said that the being subject to such an [\*551] authority vested in twelve tradesmen would suit, or would entice a person of liberal education and endowments, and such a person as the school ought to have the advantage of? I think not; and this is a strong reason against so entrusting it, independently of the other most material consideration, that from their habits and qualifications those respectable persons could not be expected ably and beneficially to the charity, or even satisfactorily to themselves, to administer such a trust. Therefore I think this exception, resting on such grounds, was properly overruled.

But, the whole matter being brought before me, I have to consider whether the scheme is liable to no other exception in this respect. Indeed, without any violence to the second exception, it may easily be made to cover this other objection to the view

(a) 15 East, 117.

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taken by the Master,—that he makes the schoolmaster subject to no control whatever,—not only to no control of the governors alone, and acting unrestrained as visitors, but also of the governors acting with or under any one else. Now I am most clearly of opinion that making a schoolmaster wholly exempt from superintendence is one of the worst arrangements possible, both for himself and for the institution of which he forms the prominent part.

The existence of the school is exposed to imminent hazard by such a scheme; its useful existence for the purposes of its foundation is rendered barely, and but barely, possible. To such defects in old institutions I trace the melancholy result which meets us in every part of the country, where we can hardly open our eyes without seeing fine endowments wholly perverted from their original uses, and supporting, not masters to teach freely all who desire education and have not the means of obtaining \*it, and whom the pious bounty of the founders intended to help; but masters who make a large profit by taking wealthy pupils and discourage their humbler countrymen from sending free scholars, lest such an association should produce displeasure to the more refined pupils and their male and female relations. The doors are indeed open to the poor. The free scholar may come, if he chooses, and will venture; and if he dreads not the frown and the scowl reserved for his use, he may be taught grammar by the teacher, and the highest of tutelage is within his reach; but no active finger will beckon him to approach—no open arm will welcome his arrival—no cordial hand will receive and will tend him; and all services and all attentions will be pointed elsewhere. The spectacle accordingly meets us, at every step we make through this munificently endowed land, of buildings with all the outward symbols of free schools—halls, offices, houses,—everything, but free scholars. There is no exclusion, no prohibition; the doors are opened, but darkened by no entering throngs; the house is magnificently provided for the reception of higher guests—the master sedulous in his care of *their* tuition—the ushers in whatever force *their* numbers may require—the instruction ample and various in all the accomplishments *their* estate and condition may demand. No such spectacle could ever be exhibited, if the schoolmasters were generally under due control; and Atherstone school, for want of that wholesome superintendence, appears to have fallen exactly into the same track with Pocklington, and so many others; for there are now but two, and sometimes but one scholar to receive the benefit of the foundation. What then is the remedy? I am of opinion that the Master has done well in vesting the government in twelve residents of Atherstone, and in giving the bishop of the diocese a share in the election both of gov-



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ernors and \*schoolmasters, because in so doing he has [\*553] followed the provisions of the foundation; but he ought to have had regard to the power, which is also given by the foundation to the governors, of making rules and ordinances to be inviolably observed for the governance and direction as well of the schoolmaster as of the scholars, and my opinion is that, following the same principle recognized by the foundation, he should have vested in the governors and bishop concurrently the power of suspension and amotion. This is a great defect in the scheme. Let the report, therefore, be referred back to the Master with directions to review the same, and approve of some convenient form of joint regulation, to be given to those parties concurrently, but with the bishop's assent as a *sine qua non*.

The next exception rests on the ground of the finding that the schoolmaster is entitled to the whole surplus, after paying 200*l.* for one year, and 60*l.* a year afterwards for contingent expenses, the defendants contending that only a reasonable sum should be allotted, and that this should be made the subject of agreement with the schoolmaster at his appointment. The Master of the Rolls has overruled this exception with one variation: he has added to the Master's finding these material words "or such other sum as the governors or keepers may under other circumstances order." I think his Honor was fully justified, both on the reason of the thing, and by the very terms of the foundation, which gives the governors the power of making ordinances touching the rents, and the salary or stipend of the Master. With this addition then I do not at all quarrel. But it remains to be seen whether or not the Master and his Honor have taken a sound view in the main part of this finding, namely, that the master has a right to all the surplus profits. The \*mode [\*554] contended for by the defendants, is certainly to be avoided if possible. Bargains made at the entrance of the master are to be encouraged, if he is, as he henceforward will be, placed under proper and superintending authority—not visitatorial authority. It is better he should have emoluments to be fixed by the endowment, or by general rules made under it. But then this endowment plainly contemplates the authority, to be exercised by the governors from time to time, of making ordinances as to the schoolmaster's stipend.

The words are, "that the same keepers and governors, and their successors, or the major part of them, from time to time thereafter, as often as need should require, should make and should be able to make, fit, necessary and wholesome statutes, decrees and ordinances in writing, concerning and touching the ordinance, governance and direction, as well of the schoolmaster and of the scholars of the school aforesaid for the time being, and of the stipend or salary of the same schoolmaster, as of other

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things concerning the same school, and the order, government, preservation and disposition of the rents, revenues and hereditaments aforesaid, which said statutes, decrees and ordinances so to be made, her said Majesty did by those presents command to be from time to time inviolably observed, according to the tenor and effect thereof forever." And again, "that all the issues, rents and revenues of all the aforesaid lands, tenements and possessions, as well by the aforesaid Thomas Fulner and Amias Hill, theretofore given and bequeathed, as thereafter to be given and assigned to the aforesaid keepers and governors of the possessions, revenues and goods of the free school aforesaid, and to their successors as aforesaid, from time to time, to be converted to the support of the master of the school aforesaid for the time [\*555] being, and to the support and in maintenance of \*the lands and tenements, possessions and hereditaments aforesaid; and also to the uses and intents to be contained and specified in the statutes and ordinances in writing, to be thereafter made by the aforesaid keepers and governors and their successors, and not otherwise, nor to any other uses or intents."

Now, these words plainly give the governors a power over the schoolmaster's salary, and that power may be exercised by varying it from time to time, and they are also enabled to apply the surplus to other purposes. Even the ordinance of March, 1607, which the schoolmaster much relies upon, contains nothing contrary to this discretion; for it says only that the bailiffs shall deliver over yearly the surplus, and that the schoolmaster shall have one of the keys of the muniment chest.

I can, therefore, see no reason to support the finding that the whole surplus belongs to the schoolmaster, unless it be contended that, the whole funds being destined to support a grammar school, no other school can be maintained out of them. But then the governors are not bound to maintain a grammar school with only one schoolmaster and no ushers. Nay, they have other purposes strictly connected with keeping a grammar school, and which may be furthered by applying a portion of the rents; so that I can have no doubt of the foundation and ordinances of 1607, taken together, leaving the control of the fund in the governors, and leaving them the power of attaching a reasonable salary to the office of the master. But then this must be done by general regulation or ordinance; and I am of opinion, that it was very wrong to do it by way of agreement with the schoolmaster on his appointment. It would have been much more correct to

have made a general rule, as usual, as to his salary, and [\*556] then have made the \*appointment. The course which has been pursued opens the door to bargaining, and to abuses of a dangerous kind. Furthermore, in making the general regulations as to stipend, the governors are to exercise a

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sound discretion; and if they do not, it is matter of review by this court by information or by petition. The decree of 1649, on which the report, as well as his Honor's order overruling the third exception, proceeds, might, indeed, have sustained that report, and rebutted the ground of the third exception. But this decree is the subject of the fourth exception, to which I am now come.

The fourth exception is taken to the Master's having allowed the decree of the Commissioners of Charitable Uses in 1649, to be used before him, and to his having proceeded upon the finding in that inquisition. My opinion continues to be, as I expressed it at the hearing of this exception, that this decree is a mere nullity. It was pronounced when there was no Lord Chancellor or Lord Keeper, being a few months after the execution of Charles I; and the validating acts referred to, do not in any way whatever give it force and effect. It is stated in Duke,<sup>(a)</sup> that there can be no commission of charitable uses issued by commissioners, but only by the Lord Chancellor or Lord Keeper; and there is no authority the other way as applicable to the decree of 1649. The statute confines the power to the Chancellor and Keeper in terms, and to the Chancellor of the duchy of Lancaster; and Duke says, "The king may name commissioners, notwithstanding the words of the statute that the Lord Chancellor, &c., shall award commissions, &c.; but commissioners, who have the custody of the Great Seal during the vacancy of the Chancellorship, cannot award a commission by virtue of this act." Now, \*besides this being in Duke—a book of au- [\*557] thority—the seventh chapter, in which the passage occurs, is a collection of Serjeant Moore's learned readings, and no authority can be higher than this; for the Serjeant was the person appointed by the House of Commons to draw the statute of the 43d of Elizabeth itself. It required such authority to give this limited construction to the act, because otherwise we might have been well justified in holding, that a power given to the Lord Chancellor or Lord Keeper—above all to the Lord Keeper—must also be understood as vested in commissioners for the custody of the Great Seal. The Statute of 1 W. & M. c. 21, places the commissioners in all respects upon the same footing with the Lord Chancellor and Lord Keeper. But this, so far from showing that the commissioners, in the reign of Charles II, or during the Commonwealth, had the like power and authority, is rather an argument the other way; the statute being prospective merely.

I have dwelt upon this matter the rather, because Chief Baron Comyn, in his Digest<sup>(b)</sup> has said, that the Lords Commissioners may issue a commission. He adds, however, "*contra*, per Moore,

(a) Bridgman's ed. p. 139.

(b) Tit. Uses, (N. 14.)

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1834:—The Attorney-General v. The Governors of Atherstone Free School.

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Duke, 144;" that is, he allows that Sir Francis Moore had given an opposite opinion.

The great authority of Comyn, however, becomes of no avail to the relator, in support of the judgment below in this case; for it is given by the able and learned Chief Baron after the statute of William and Mary, and, consequently, must be taken to be with reference to the then state of the law. The only inadvertency consists in stating the authority of Moore in Duke, [\*558] as a conflicting \*authority; whereas the different dates of the two *dicta*, and the changes which the law had undergone in the interval completely reconcile the books. I therefore dismiss the decree of 1649, as a mere nullity. The statutes passed on the Restoration give it no validity whatever, for they are confined to decrees and commissions issued by the Lord Chancellors and Lord Keepers, and put these on the same footing with the proceedings of those Lord Chancellors and Lord Keepers, whom the king had entrusted with the custody of the Great Seal. His Honor indeed holds this only to be a matter of form. But it is plainly a matter of substance, and renders the whole proceedings under the commission void.

The fourth exception, therefore, must be allowed as well as the third. The addition made by the Master of the Rolls to the order pronounced on the third exception may, however, be allowed to stand, as an indication that, in exercising their discretion of making general rules for the appointment of the Master's salary, the governors may keep a fund in reserve, varying, from time to time, by rules of their making, so as to provide for contingent expenses.

As the first exception, therefore, was rightly overruled, the order of his Honor, on that exception, must be affirmed. On the second, I reverse his Honor's order and refer it back to the Master, with directions to approve of a scheme for vesting in the bishop of the diocese, jointly with the governors, a power of suspension and renewal, and let him state in what way the same shall be exercised, with that notice, and at what periods; but so always as the consent of the bishop shall be a *sine qua non*.

The order of his Honor on the third exception must be [\*559] reversed, and \*that exception allowed, with a declaration that the governors shall, from time to time, make general orders and regulations for appointing a reasonable and proper stipend to the master, and for disposing of any yearly surplus in conformity to the objects of foundation, having regard always to the keeping a sufficient fund in their hands for meeting contingent expenses; such fund not to be less than 60*l*. a year; whereof 25*l*. are to accumulate. The order disallowing the fourth exception must be reversed, and the exception allowed generally.

1832.—Trickey v. Trickey.

In consequence of the course which I have pursued, and of the footing on which the charity will now be placed, I need not enter on the subject of the schoolmaster's conduct, further than to say, that I agree with his Honor entirely in feeling great disapprobation of several parts of it. When the cause comes back for further directions, I shall, if it be then found necessary, enter into that matter; at present it is not necessary.

\*TRICKEY v. TRICKEY.

[\*560]

ROLLS.—1832: 9th March.

A testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and after her decease for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the meantime; and in case any of the said children should die under twenty-one, and have one or more child or children who should survive the testator's daughter, and live to attain twenty-one, such child or children to be entitled to his or their parent's share: provided also, that in case any child or children of his daughter should die before attaining twenty-one, the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them if more than one, the issue of any deceased child or children to stand in the place of the parent or parents; with a limitation over, provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age: Held that, the limitation over was intended to take effect only on failure of grandchildren who should survive the testator's daughter, and not live to attain twenty-one, and was, therefore, not too remote.

RICHARD TRICKEY, by his will, gave the residue of his personal estate to trustees, (whom he also appointed his executors,) upon trust to pay the interest and dividends to his daughter, during her life, for her sole and separate use; and the will then proceeded as follows:—"And after her decease, in trust to pay, assign, or transfer the principal or capital sums, or the securities on which the same may be invested, unto and amongst all and every the children of my said daughter, Jane Ann Frederick, if more than one, share and share alike, and if but one, the whole to such one child, when and as he, she, or they shall respectively attain the age of twenty-one years; and, in the meantime, to pay and apply the dividends and interest thereof for and towards the maintenance and education of such child or children respectively; and in case any or either of the said children, if there shall be more than one, shall die under the said age, and have one or more child or children who shall survive my said daughter, and live to attain the said age, such last mentioned child or children, shall be entitled to the share or shares of his or their parent or parents, of and in the said trust moneys, and the interest and dividends thereof. Provided also, that in case any child

\*or children of my said daughter shall die before he, she [\*561]

1832.—*Trickey v. Trickey.*

or they shall attain the age of twenty-one years, the share or shares of him, her or them so dying, of and in the said trust moneys, shall go and remain to the survivors or survivor of the said children, and the issue of any deceased child or children who shall marry and die under the said age, to be equally divided between them, if more than one, the issue of any deceased child to stand in the place of his, her, or their parent or parents. Provided further, and it is my will, that if there shall be no child of my said daughter, or there being any such, no one of them shall live to attain the age of twenty-one years, nor leave any issue who shall live to attain thereto, my said trustees and the survivors and survivor of them, his executors and administrators, shall stand possessed of and interested in the said trust moneys, and the dividends and interest thereof, in trust to assign and transfer all my bank stock to my great nephew, Thomas Trickey, the son of my nephew, William Trickey, now or late of Oakingham, in the county of Berks; and all my stock in the 4 per cent. bank annuities, and all the residue of the said trust moneys, unto and equally between the rest of my relations, namely, the other children of my said nephew, William Trickey, the sons and daughter of my late brother, John Trickey, and Mary Gilbert, the daughter of my late sister Rachel Gilbert, or their respective executors or administrators: provided always, nevertheless, that if the dividends and interest of my residuary estate shall exceed the annual sum of 200*l.*, the surplus thereof shall be reserved and accumulate for the benefit of the child or children of my said daughter; and, on failure thereof, for my several other relatives hereinbefore named, in equal proportions."

The testator made a codicil to his will in the following words: "[\*562] By this codicil to the last will \*and testament of me, Richard Trickey, I revoke the contingent bequest of my bank stock to my great nephew, Thomas Trickey; and I will that on failure of children and grandchildren of my daughter, Jane Ann Frederick, as therein is expressed, my said bank stock, and 4 per cent. bank annuities, and the residue of the said trust moneys, shall be respectively transferred and paid to my several relations, namely, the said Thomas Trickey, and the other children of my nephew, William Trickey, the sons and daughter of my late brother, John Trickey and Mary Gilbert, daughter of my late sister, Rachel Gilbert, in equal proportions."

The testator died in June, 1800. His daughter, Jane Ann Frederick, died in December, 1828, having had one child, who died at the age of nine years. The bill was filed by the relations of the testator, named in the contingent bequest of the residue in the will and codicil, against the surviving executor; and the principal question in the cause was, whether the limitation over in the event of the testator's daughter having no child who

1832.—Trickey v. Trickey.

should live to attain twenty-one, nor leave any issue which should live to attain that age, was or was not too remote; and this depended upon the point whether, according to the true construction of the will, it was the intention of the testator to confine his gift in favor of such grandchildren only of his deceased daughter as should survive his daughter.

Mr. *Bickersteth*, Mr. *Pemberton*, Mr. *Temple*, Mr. *Hayes* and Mr. *Wright* for the plaintiffs:—It is clear that the testator by the word “issue” in the clause containing the limitation over, did not mean issue generally, for in the codicil he expressly refers to this limitation as having been restricted to the children and \*grandchildren of his daughter. It is no less manifest, [\*563] upon an examination of the frame and context of this will, that the word “issue” in the clause introducing the limitation over, must be understood with reference to the word “issue” in the prior limitation, and that it must be restricted, consistently with the former proviso, to such grandchildren of the testator’s daughter as should be living at the time of her decease. To give a different interpretation to the word “issue” in the clause containing the limitation over, would be to introduce an inconsistency between that and the first proviso, for no other purpose than to defeat the clear intention of the testator. Now, the principle which the court has adopted is to aid, if possible, any deficient expression of the testator’s intention, in one part of the will, where his meaning may be collected from the unambiguous language of another part; and it has, in many cases, supplied words for that purpose: *Spalding v. Spalding*, (a) *Shepard v. Lessingham*. (b) If the court will take such liberties with a will in order to give effect to a testator’s intention, it would not be justified in defeating the manifest intention of the testator, by putting such a construction on the word “issue” in the clause containing the limitation over, as is inconsistent with the sense in which the same word is used in a prior clause, and contradicted by the explanation which the testator gives of his own meaning in the codicil.

Mr. *Tinney* and Mr. *Rolfe contra*:—Even if the codicil be brought in aid of the testator’s intention to use the word “issue” in the contingent bequest in a restricted sense, the limitation over is still too remote. Supposing the word “issue” in the clause containing the limitation over to be restricted to the \*grandchildren of the testator’s daughter, the gift to [\*564] such grandchildren is not made to depend on their surviving their grandmother. Nothing is said in the contingent bequest as to that further restriction, and the codicil refers to the

(a) Cro. Car. 185.

(b) Ambl. 122.

failure of children and grandchildren as *therein*, that is, in the contingent bequest expressed. The codicil, therefore, in reality furnishes a strong argument against the plaintiffs. The issue of a deceased child are to take the share of their parent, if they attain the age of twenty-one, without any restriction limiting the issue to such grandchildren as should be living at the death of their grandmother. The intention of the testator must therefore be taken to be, that all such grandchildren of Jane Ann Frederick as should attain the age of twenty-one should take a vested interest, and the limitation over, which is to take effect only upon failure of such grandchildren, will be too remote.

*Mr. Bickersteth*, in reply.

THE MASTER OF THE ROLLS :—The first provision in the will in favor of the children of a child of the daughter who should die under twenty-one, is confined to such grandchildren as should survive the daughter; and, if in the subsequent passages of the will the testator is to be understood to speak of such grandchildren only, the limitation over is plainly not too remote, as it extends only to a life in being, and twenty-one years. In this first provision, he refers only to the case of a child of the daughter dying under twenty-one and leaving no issue; and this is obviously the event for which he means to provide by the next limitation. If a child of the daughter dies under twenty-one, leaving no issue, the share intended for such child is to be [\*565] divided between the surviving children and the \*issue of a deceased child, such issue with respect to such division to stand in the place of their parent. It is reasonable to intend that the testator meant that the same grandchildren, who by the former clause were to take their parent's original share, should take that portion of the share which accrued by the death of another child of the daughter without leaving issue, and which their deceased parent, if living, would have taken, namely, the grandchildren only who should survive the daughter. Then follows the limitation over in case there be no child of the daughter who shall live to attain the age of twenty-one, or leave issue who shall attain that age; and, if the prior gifts are only in favor of grandchildren who shall survive the daughter, the gift over must be intended to take effect upon failure of the former gifts, and is, therefore, to take effect upon the failure of grandchildren who shall survive the daughter and not live to attain twenty-one, and is, therefore, plainly not too remote.

The daughter having lived for twenty-six years after the death of the testator, I am of opinion that the accumulations of the dividends and interest exceeding the annual sum of 200*l.* were good for twenty-one years, under the Statute of the 39 & 40 G.



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1834.—Angier v. Stannard.

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III, c. 98, and the daughter, during the rest of her life, was entitled only to the interest of the accumulated fund, which, after her death, passed by the limitation. The accumulation having ceased at the end of the twenty-one years, from that time, during her life, the daughter was entitled to the whole sum beyond the 200*l.*, being the person who would have been entitled if such accumulation had not been directed.

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\*ANGIER v. STANNARD.

[\*566]

ROLLS.—1834: 26th and 27th June.

The owner of an equitable estate conveyed it to trustees upon trust for sale, and by a deed of even date declared the trusts upon which the produce of the sale were to be applied. The party, who had the mere legal estate, and no beneficial interest, refused to convey it to the equitable trustee, unless the persons interested as *cestuis que trust* under the deed of even date were made parties to the conveyance. He was not justified in that refusal, but as he had acted *bona fide* under the advice of a conveyancer of character, the court made the decree against him without costs.

By an indenture of mortgage dated the 2d of February, 1828, certain freehold and leasehold lands, messuages and hereditaments were assigned to Jeremiah Stannard for the residue of a term of 1,000 years, subject to a proviso whereby it was agreed that, if the plaintiff John Angier, the elder, his heirs, executors, administrators or assigns, should pay unto Jeremiah Stannard, his executors, administrators or assigns, the principal sum of 1,100*l.* and interest therein mentioned, then Stannard, his executors, administrators or assigns, would assign, surrender or otherwise assure all and singular the said freehold and leasehold hereditaments respectively to John Angier, the elder, his heirs, executors, administrators and assigns, or otherwise as he or they should direct or appoint.

John Angier, the elder, having subsequently become desirous of vesting the freehold of inheritance and equity of redemption in the mortgaged premises, and also certain other estates and hereditaments, in trustees for sale, for the purpose of raising money to pay off the mortgage, and to answer his other occasions, by indentures of lease and release and assignment, of the 7th and 8th of August, 1832, conveyed unto John Angier, the younger, and Edward Clay, their heirs and assigns, the freehold messuages and hereditaments comprised in the indenture of the 2d of February, 1828, and also assigned and transferred the leasehold land and premises to John Angier, the younger; and Edward Clay, their executors, administrators and assigns, for the \*residue then to come of the 1,000 years' term, [\*567] upon trust to sell and dispose of the same hereditaments

1834.—Angier v. Stannard.

and premises in the manner therein expressed, without any further consent or concurrence of any person or persons whomsoever, and to stand possessed of the moneys arising therefrom upon the trusts declared in and by a certain other indenture of even date, and therein referred to; and it was thereby declared, that the receipt of the trustees should be a sufficient discharge for all moneys which they should receive in virtue of the trust deed.

In pursuance of the trust, the greater part of the estates and premises were sold in lots to different purchasers; and out of the produce of such sales the sum of 1,200*l.* was, in the month of March, 1833, by the direction of John Angier, the elder, paid to Jeremiah Stannard, in full satisfaction and discharge of all principal money and interest due to him on his mortgage security; and a memorandum in the following words, signed by Stannard, was indorsed upon the mortgage deed of the 2d of February, 1828—"Be it remembered that I, the within named Jeremiah Stannard, do hereby acknowledge to have had and received of and from the within named John Angier, &c., the sum of 1,200*l.*, being in full discharge of all principal moneys and interest, due and owing to me from the said John Angier, upon security of the freehold and copyhold hereditaments comprised in the within written indenture; and I do hereby for myself, my executors, administrators and assigns, undertake, promise and agree, that I will, when required, but at the costs and charges of the said John Angier, his appointees, trustees, or assigns—execute an assignment of the freehold premises comprised [\*568] in the within indenture, for the residue of the \*term within mentioned, to such persons, to such uses, and in such manner and form as he or they shall direct or appoint."

The conveyances to the purchasers of the several lots were not completed immediately upon the sale; but it was arranged between the trustees and the respective purchasers, that an assignment of the term in the freehold hereditaments should be taken to a trustee nominated by John Angier, the elder; and a draft of such assignment was accordingly prepared and sent to the defendant's solicitor, who made various objections thereto. The draft was afterwards laid before counsel to be settled by him on behalf of all parties; and the draft, so prepared and settled, was again sent to Stannard, who objected to it on the ground that the *cestuis que trust* under the deed of trust were not made parties: and he returned the draft, accompanied by a letter from his solicitor in the following terms: "I return you this draft, perused by Mr. — on behalf of Mr. Stannard, with a copy of his accompanying observations. Mr. Stannard cannot dispense with the required concurrence of the *cestuis que trust*."

The draft, as settled by the counsel for Mr. Angier, was afterwards engrossed, and the engrossment, having been executed by

1824.—Angier v. Stannard.

Mr. Angier and the trustees, was tendered to Mr. Stannard for execution. That gentleman, however, declined to execute it; and the present bill was thereupon filed by John Angier, the elder, and the trustees for sale under the trust deed, praying that Mr. Stannard might be compelled to assign the legal estate in the term then vested in him, as the plaintiff should direct, and that he might be decreed to pay the costs of the suit.

\*The defendant, by his answer, stated that he had al- [\*569]  
ways been ready and willing, and was now ready and willing to execute such assignment of the trust term and premises as he should by his counsel be advised to execute, and such as should save him from incurring any risk or responsibility: but he submitted that the engrossment tendered to him was not a proper engrossment for him to execute; and he further submitted and insisted that the parties, respectively entitled to the moneys arising from the sales made under the trust deed, were necessary parties to such an assignment as the defendant ought to execute.

It was proved in the cause by evidence, that a conveyancer of experience and reputation, who was consulted on behalf of the defendant, had advised the defendant to require that the *cestuis que trust* under the indentures of the 7th and 8th of August, 1832, should be parties to the assignment.

Mr. Pemberton, Mr. Preston and Mr. Coventry, for the plaintiffs, said the real question was upon what terms the decree against the defendant ought to be made; whether with or without costs. The defendant was no more than a mere trustee of the legal estate in the term for the plaintiffs, by whom the sale and conveyances were to be made; and it was impossible at this time of day to contend that to an assignment of that legal estate, required from the defendant, the persons who were interested as purchasers under the trust deed were necessary parties; Redesdale on Pleading, (a) *Byfield v. Taylor*. (b) The defendant having occasioned the present suit by his unreasonable and obstinate \*conduct, he ought in justice to bear the costs of it; the [\*570] plaintiffs were not to suffer because the defendant had been badly advised.

Mr. Bickersteth and Mr. Richards, *contra*, submitted that it was by no means so clear as it had been assumed on the other side to be, that, in the particular circumstances of this case, the *cestuis que trust* were not necessary parties to the assignment; *Calverley v. Phelps*, (c) *Goodson v. Ellison*. (d) In the latter case Lord El-

(a) Page 174, 4th ed.

(b) 1 Beattie, 91.

(c) 6 Mad. 229.

(d) 3 Russ. 533.

1834.—*Angier v. Stanford*.

don, reversing the judgment of Lord Gifford, had decided that the trustees had a right to have the form of a proper conveyance settled in the Master's office; and his Lordship proceeded on the ground that, as there had been much devolution of title, the trustees had a right to have the title examined in this court, instead of being required to acquiesce in an opinion which was not clothed with the sanction of judicial authority. That reasoning applied strongly to the present case. The defendant had acted *bona fide*, and had been advised by an experienced conveyancer, that he could not safely execute an assignment to which the *cestuis que trust* were not parties; and he was, therefore, fully justified in obtaining the direction of the court, before he executed the required conveyance. The true rule with respect to the situation and duty of trustees, was clearly expressed in *Taylor v. Glanville*,<sup>(a)</sup> which decided that a trustee was always entitled to his costs, unless where he had acted from motives of obstinacy and caprice.

Mr. Pemberton in reply.

[\*571] \*THE MASTER OF THE ROLLS:—The proper decree in this case is matter of course, that the defendant should execute a conveyance of the legal estate to the equitable trustees, and that all necessary parties should join in the conveyance to be settled by the Master, if the parties differ. If either party should be dissatisfied with the opinion which the Master should form as to the necessary parties, the question, which has now been discussed, would then come regularly before the court upon an exception. As, however, the defendant is willing to adopt the conveyance which has been prepared and engrossed without making the *cestuis que trust* parties, in case the court should think that they are not necessary parties, I will now proceed to give my judgment upon that point.

If he, who has the mere legal estate, so deals with it, as to sanction any act done by the equitable trustee to the prejudice of the *cestuis que trust*, he thereby becomes a party to the breach of trust, and is answerable accordingly; but where the equitable trust is for the purpose of sale, he who has the legal estate is, for the benefit of the *cestuis que trust*, bound, when required, to convey it to the equitable trustee to enable him to execute his trust. If, in parting with the legal estate, he goes beyond the mere purpose of conveying it to the equitable trustee, and so deals with it as to facilitate a breach of trust by the trustee, and a breach of trust be in consequence committed, he is deemed a party to such breach of trust, and is responsible for it.

(a) 3 Mad. 176; See *Jones v. Lewis*, 1 Cox, 167.

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 1846.—Sawyer v. Birchmore.
 

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In this case it was the duty of the defendant, who had the mere legal estate, to clothe the equitable trustee with it; and, nothing further being required from him, and it being manifestly for the benefit of the *cestui que trust*, \*it could [\*572] not be necessary for the defendant's security that the *cestuis que trust* should be made parties to the conveyance, in order to evidence their consent to the deed, and the demand made, on the part of the defendant in this respect, is not to be justified.

I am not, however, willing to charge the defendant with the costs of the suit which he has thus occasioned. He has acted *bona fide* under advice which has misled him, but upon which he had reason to rely from the experience and character of the adviser. It is for the interest of society that a trustee, under such circumstances, should not be fixed with the costs of the suit; but the adviser who misled him, being of his own choice, I cannot give him the costs of the suit.

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 SAWYER v. BIRCHMORE.

ROLLS.—1835: 12th and 15th May and July 22d.

Demurrer by a witness examined by the plaintiffs, on the ground that he had been the solicitor of some of the defendants, and that the interrogatory required the disclosure of confidential communications, overruled, the witness being bound to produce letters communicated to him from collateral quarters to which the interrogatory pointed, and to answer questions seeking information as to matters of fact, as distinguished from confidential communications.

A witness, on the overruling of his demurrer, is liable to pay the same costs as a defendant, by analogy to the thirty-second of the new orders of 1828.

THIS was the demurrer of John David Towse, a witness examined by the plaintiffs, to an interrogatory whereby he was asked, whether in the year 1817, or at any and what time, he was employed as solicitor or agent, for any and which of the parties in the cause; and whether or not he wrote and sent any letters to any other, and which of the said parties, or to any and what person or persons, acting as their solicitor or solicitors, touching any and which of the matters in the suit; \*and whether [\*573] or not he received any letters from any and which of such parties, or from any and what person or persons, acting as their solicitor or solicitors. And if so, the witness was required to produce such letters, or copies of them, as were in his possession or power, and as to such letters or copies as were not in his possession or power, to set forth the contents thereof, and what was become of such letters or copies. And whether or not he did at any time, and when, attend any meeting, or meetings of any of the parties to the suit, or their solicitors or agents, touch-

1835.—Sawyer v. Birchmore.

ing or concerning their interests or claims in the matters in the pleadings mentioned; or any and what part thereof. And if so, to set forth when and where such meeting or meetings took place, who were present, and what conversation or communications took place thereat.

To this interrogatory the deponent said, that in the year 1817 he was employed as solicitor or agent for the defendants, Henry Robert Briggs, Robert Briggs, and Ann Birchmore, and that he wrote some letters, touching the matters in the suit, to certain persons, when so acting as the solicitor for the said defendants, and that he received certain letters when acting as such solicitor, but as to and from that part of the interrogatory which inquired after the persons to whom the said letters were addressed, and required him to produce the said letters, to the close thereof, he demurred thereto, and, for cause of demurrer said, that being at the time of writing the said letters employed as solicitor by some of the parties, defendants in the cause, he could not depose thereto without disclosing communications made in confidence to him by his clients.

Mr. *Pemberton* and Mr. *Lynch*, in support of the demurrer:—[\*574] The rule is settled that a solicitor cannot be called upon to disclose confidential communications which have passed between him and his client. He is not only protected from answering this interrogatory, but it was his duty to refuse answering it, for the privilege is that of the client and not of the solicitor; *Wilson v. Rastall*.<sup>(a)</sup> Neither can he be called upon to produce the documents which he is by this interrogatory required to produce, for all letters passing between a solicitor and his client, or between a solicitor acting on his client's behalf, and any other person, with reference to, or in contemplation of a suit, and pending its progress, are protected. He is equally protected from disclosing what passed between him and his clients, or between him in his character of their solicitor and any other persons, at any meeting held with reference to matters in which he was confidentially employed. Mr. *Towse* is no longer the solicitor for the defendants; but the privilege, which protects him from being examined as to such points as have been communicated to him while engaged in his professional capacity, never ceases; *Phillips on Evidence*.<sup>(b)</sup> It is not sufficient to say that the cause, or the relation of solicitor and client is at an end, the mouth of such a person being (as was said by Mr. Justice Buller) closed forever; *Wilson v. Rastall*.<sup>(c)</sup>

Mr. *Bickersteth* and Mr. *Moore contra*.:—This bill is filed by

(a) 4 T. R. 753.

(b) Vol. I, p. 132, 6th edit.

(c) 4 T. R. 759.

1835.—Sawyer v. Birchmore.

persons claiming to be some of the next of kin of a testator, who died intestate as to the residue of his personal estate in the year 1814, against the defendants, among whom the residue has actually been distributed under a decree of the court as the sole next of kin. In the year 1817 Mr. Towse was \*so- [\*575] licitor for some of the defendants; and at that time, and for some years afterwards, the plaintiffs and defendants were making common cause together, all claiming, and admitted by each other, to be the next of kin of the testator, and seeking to satisfy the executors that their claims were well founded. The letters and communications between Mr. Towse and the parties or their solicitors, to the disclosure of which Mr. Towse demurs, took place between the years 1817 and 1825, when the plaintiffs and defendants were not opposed to each other, and when a suit was so far from being in contemplation, that they were all concurring in their endeavors to satisfy the executors without a suit. In the year 1825, one executor filed a bill against the other, for the purpose of having the residue distributed among the persons who should be found next of kin, and in that suit the distribution, of which the present plaintiffs complain, was made. The interrogatory does not require the production of any letters except those which passed between Mr. Towse and persons who were not his clients, and these are clearly not privileged. The other part of the interrogatory seeks a disclosure of what passed at a meeting between Mr. Towse, then solicitor for three of the defendants, the solicitor of other defendants, and some of the defendants themselves, at a time when there was no subject in dispute, when all parties admitted themselves to be the next of kin, and when Mr. Towse's clients had no distinct and separate interest from the other persons. The information sought relates to a collateral matter of fact; and it has been held that an attorney is bound to answer questions as to collateral facts within his knowledge, however unfavorable such facts may be to his client, and though the knowledge of them may have been acquired in consequence of his character as attorney; *Spenceley v. Schulenburg*.<sup>(a)</sup> In *Bramwell v. Lucas*,<sup>(b)</sup> a conversation between a client and his attorney, at the office of the latter, the effect of which was to prove an act of bankruptcy against the client, was held not to be privileged; and Lord Tenterden, in giving the judgment of the court, put the ground of the decision upon this distinction, that the conversation related to a matter of fact, and not to the matter of confidential communication.

Mr. Pemberton in reply.

The MASTER OF THE ROLLS<sup>(c)</sup> said the language of Lord Ten-

(a) 7 East, 357.

(b) 2 B. & C. 745.

(c) Sir C. Pepya.

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terden, in the case referred to, required consideration. On the following day his Honor said he had looked into the case of *Bramwell v. Lucas*, and certainly the communication between the attorney and client came very near to a confidential communication, and yet the court held it not to be privileged. Lord Tenterden in his judgment said:—"The action was brought by the assignees of Noakes, a bankrupt; and Scott, his attorney, was called by the plaintiff to prove the act of bankruptcy. He gave in evidence that upon his (Scott's) suggestion, a meeting of Noakes' creditors was called; that the meeting was to be held on the 7th of November at twelve at noon; that Noakes called on him that morning and asked if he could safely attend such meeting without being arrested; that Scott advised him to remain at his office till it was ascertained whether the creditors would engage to give him safe conduct, and that he accordingly remained there two hours to avoid being arrested, till Scott returned from

the meeting: and the question is whether the whole, or [\*577] any \*part of this evidence ought to have been excluded: that Scott was competent to prove that the meeting was called; that it was called upon his suggestion, and that Noakes came to and remained at his office, is beyond all doubt; but the point disputed was, whether Noakes' question to Scott, and Scott's answer to him was not within the privilege, and we think it was not." And the ground upon which the court decided that it was not, was this, that the question put by the bankrupt to Mr. Scott was not a question for legal advice, put to him in his character of attorney, but a question for information as to a matter of fact. "It can hardly be supposed," said Lord Tenterden, "that a man could ask as *matter of law*, whether he would be free from arrest whilst attending a voluntary meeting of creditors; but he might well ask as *matter of fact*, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent an arrest, and Mr. Scott's answer implies that the question was put with the latter view.

In *Spenceley v. Schulenburg*(a) it was held that an attorney was bound to disclose, when called as a witness, the contents of a notice, which he received from the adverse attorney, to produce a paper in the hands of his client, Lord Ellenborough observing that the privilege of an attorney extended only to confidential communications from his client, and not to communications from collateral quarters, although made to him in consequence of his character of attorney.

These authorities showed that letters communicated to Mr. Towse from collateral quarters, to which the interrogatory [\*578] clearly pointed, were not protected, and that \*the

(a) 7 East, 357.



1833.—Wilson v. Thomas.

witness was bound to answer questions seeking information as to matters of fact, as distinguished from matters of confidential communication. The demurrer must be overruled, and with costs, but with liberty to the parties defendants to raise such objections at the hearing as they might be advised.

*July 22d.*—A question was afterwards raised, whether, on the overruling of a demurrer by a witness, the witness was liable to pay the taxed costs occasioned thereby, by analogy to the thirty-second of Lord Lyndhurst's Orders, which provides that upon overruling a demurrer, the defendant shall pay the tax costs occasioned thereby, unless the court shall make order to the contrary; or whether the old rule which limited the costs of the demurring party to 5*l.*, was still applicable to the case of a witness.

The point stood over for the purpose of inquiring into the practice, and on a subsequent day,

The MASTER OF THE ROLLS<sup>(a)</sup> said that the very same question came under the consideration of the court in the case of *Vai-liant v. Dodomedé*.<sup>(b)</sup> In that case a witness, one of the sixty clerks, demurred; and, the demurrer having been overruled, a motion was made that the witness might pay 5*l.* costs, as directed by Lord Clarendon's order in case of the overruling of a demurrer by a defendant. Three questions arose, first, whether the court should make the witness pay costs at all; secondly, to what amount; and thirdly, how \*payment of them [\*579] was to be enforced. Lord Hardwicke was of opinion that a witness, on the overruling of a demurrer, ought to pay the same costs as a party demurring, and ordered the witness to pay 5*l.* costs, by analogy to Lord Clarendon's order. This was exactly the same point, substituting only the new orders, for Lord Clarendon's; and the witness must, therefore, pay the taxed costs occasioned by the demurrer, as required by the thirty-second new order.

(a) Sir. C. Pepys.

(b) 2 Atk. 192.

### WILSON v. THOMAS.

ROLLS.—1833: 30th July.

A testator gave all his personal and leasehold estate to trustees upon trust to sell and dispose of the same, and convert the whole into money, and out of the moneys to arise by such sale, disposition and conversion, to pay his debts and the legacies given by his will, or which he might give by any codicil thereto. He afterwards made a codicil by which he gave to the same trustees 2,000*l.* out of his personal estate, upon trust, to distribute and pay the same for charitable purposes:

Held, that the charitable legacy was not charged upon the leasehold estate, but was payable out of the testator's purely personal estate.

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JOHN THOMAS, by his will, dated the 15th of June, 1824, gave and bequeathed all and singular his goods, chattels, securities for money and personal and leasehold estates and effects whatsoever and wheresoever, not therein before specifically or otherwise disposed of, to Benjamin Thomas, John Conway and John Whitby, their executors, administrators and assigns, upon trust, as soon as conveniently might be after his decease, to sell and dispose of the same, and convert the whole into ready money; and out of the moneys to arise from such sale, disposition and conversion, to pay his just debts, and funeral and testamentary expenses, and the legacies and annuities given by his will, or which he might give by any codicil or codicils to his will; and subject thereto, upon the several trusts therein mentioned. And he appointed the said trustees executors of his will.

[\*580]. \*The testator afterwards made a codicil to his will, by which he gave and bequeathed to the same trustees and executors, the sum of 2,000*l.*, out of his personal estate, upon trust, to divide, distribute and pay the same unto and amongst the treasurers and trustees of so many of the public charities in Liverpool, as they, in their discretion, should think proper.

The testator's leasehold property, mentioned in the will, consisted of leaseholds for lives; and the question was, whether the charitable legacy given by the codicil was charged upon that property, and consequently void in proportion to the extent to which the property given to the trustees and executors was composed of such leasehold property.

Mr. *Bickersteth*, for the plaintiffs, said the testator had, by his will, created a mixed fund composed of money and personal and leasehold estates, and had charged upon that fund, the legacies which he might give by any codicil to his will. The legacies to be given by any codicil were to be paid out of the moneys to arise by the sale and conversion of his personal and leasehold estates. The question was, therefore, whether this was not such a codicil as the testator contemplated in his will; and if so, whether the words "personal estate" in the codicil could be understood in any other sense, than as the moneys arising from the sale and conversion of the testator's whole property. If that were the right construction of the codicil, the legacy was void in proportion to the extent to which it was composed of real estate.

Mr. *Pemberton contra*.

[\*581]. \*THE MASTER OF THE ROLLS:—As the testator has distinguished between his personal and his leasehold estate by his will, and has expressly directed the charitable legacy given by the codicil to be paid out of his personal estate,

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1834.—Jones v. Powles.

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I cannot consider that legacy as charged upon the leasehold estate; and it is payable, therefore, wholly out of the testator's personal estate.

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JONES v. POWLES.

ROLLS.—1834: 7th, 27th and 28th June and 7th July.

The rule that a purchaser for valuable consideration without notice is protected by the legal estate, extends not only to cases where his title is impeached by reason of some secret act, done by the vendor, or those under whom he claims, but to cases also where his title is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, provided such asserted title is clothed with possession, and the falsehood of the alleged fact could not have been discovered by reasonable diligence.

• By indentures of lease and release, dated respectively the 21st and 22d of December, 1800, John Jones, a hatter in Hereford, mortgaged a freehold house and premises, situate in High street, in that city, of which he was seised in fee, to William Holbrook and his heirs, to secure the sum of 200*l*., advanced to him by Holbrook, with interest.

John Jones paid off the mortgage and all arrears of interest in the month of August, 1808, and at the same time took from Holbrook a memorandum, which was indorsed upon the mortgage deed, acknowledging such payment; but he never obtained a reconveyance of the property, and at the time of his death, which took place in the month of May, 1814, the legal estate in the mortgaged premises remained outstanding in Holbrook. Immediately upon the death of John Jones, one Benjamin Meredith, who had been his shopman and \*assisted him [\*582] in his business, produced and proved in the proper Ecclesiastical Court, an instrument purporting to be the will of John Jones, by virtue of which he obtained undisturbed possession of the messuage and premises comprised in the mortgage. This instrument was in the following words:—"The will and testament of John Jones, hatter, dated September 12th, 1802. I do hereby will and bequeath, after all my just debts and funeral expenses are paid, the whole of my real and personal property to my assistant, Mr. Benjamin Meredith. In testimony of which witness, my hand: John Jones. Witnesses: John Cowmeadow, Henry Hill, Thomas Jones."

Meredith, shortly after the death of John Jones, had occasion to borrow a sum of 300*l*. from one Hall, upon the security of the property in question; and, accordingly, in consideration of 300*l*. lent to Meredith by Hall, Holbrook, as the trustee of the legal estate for Meredith, and at his request, joined with Meredith in a deed, dated the 2d of February, 1815, by which the messuage and premises in High street, were conveyed to Hall, his heirs

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and assigns, subject to redemption upon payment of the 300*l*. and interest.

Meredith died in the month of April, 1815, having devised the equity of redemption of the mortgaged premises to his wife, Susannah, in fee; and by divers mesne conveyances, the title to that equity of redemption became, in the month of March, 1821, vested in a person of the name of James Jones in fee.

In the month of October, in that year, one Watkins, at the request of James Jones, paid off the 300*l*. then due upon the mortgage to Hall, and, in consideration of the money so paid, [\*583] the mortgaged premises were, at the same time, conveyed by Hall and Jones to Watkins, subject to redemption by Jones, on payment of the 300*l*. and interest; and that sum was, by a subsequent transaction in September, 1822, increased to 600*l*.

Soon after the period of the last mentioned transaction, James Jones and Watkins having entered into co-partnership, they applied to John Powles for a loan of 450*l*., and, Powles having advanced the money, Watkins, with the consent of his partner Jones, deposited with Powles the mortgage deed, and all the title deeds relating to the property, by way of security for his advances. Powles having afterwards lent them further sums, he was eventually let into possession as mortgagee; and he continued in possession until the month of April, 1828, when he died, leaving the defendant, Sarah Powles, his widow, whom he appointed his executrix, and to whom he devised all his mortgages and trust estates.

Upon the death of her husband, Sarah Powles entered into possession, and made further advances to Jones and Watkins, on the security of the same property, to the amount, in the whole of 2,000*l*.; and in the month of September, 1830, James Jones and Watkins, by a deed which recited that Sarah Powles had contracted for the purchase of this estate for 1,200*l*., and that she was to retain that sum in part discharge of the moneys due to her from Jones and Watkins, it was witnessed that, in consideration of 1,200*l*. and of the discharge given by Watkins to Jones from the 600*l*. due to him, Watkins and Jones conveyed and released the house and premises to Sarah Powles, her heirs and assigns, forever.

In the month of July, 1831, the present bill was filed by David Jones and Sarah his wife, against Sarah Powles. The [\*584] bill alleged that John Jones died intestate, leaving the plaintiff, Sarah Jones, his heiress at law; that John Jones never made any will duly executed and attested to pass real estate by devise, and that the signature and the attestations of the witnesses to the pretended will were forged or fictitious; and it prayed that the plaintiffs might be permitted to redeem

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the estate, on payment of what should be found due in respect of the mortgage; and also, if necessary, that an issue might be directed for the purpose of trying whether John Jones made any valid devise of the property in question.

The defendant having put in her answer, setting forth her title, as it has been already stated, the plaintiffs filed a supplemental bill, in which they detailed the history of the several mortgage transactions, as before mentioned, and alleged that the defendant was in possession and enjoyment of, and claimed to be entitled to the premises, not as mortgagee, but as absolute owner under the forged will. The supplemental bill further stated that, at the instance of the plaintiffs, the administration with the pretended will annexed, obtained by Meredith, had been declared void by the Ecclesiastical Court, and fresh letters of administration granted to the plaintiff, Sarah Jones. It then charged that the defendant had notice of the forgery, and prayed the same relief as if these matters had been stated in the original bill.

The defendant, by her answer to the supplemental bill, admitted that the mortgage to Holbrook was paid off in the lifetime of John Jones, but that the legal estate was not reconveyed at his death; and she claimed to be entitled to the absolute ownership of the house and premises, as a purchaser for valuable consideration, without notice of the forgery; and she denied the title \*of the plaintiff, Sarah Jones, as the heiress at law [\*585] of John Jones.

At the hearing of the cause the Master of the Rolls directed that the bill should be retained for twelve months, with liberty to the plaintiffs, in the meantime, to bring an action of ejectment to recover possession of the premises; and the defendant was not to set up the Statute of Limitations, or the legal estate in the premises, which was outstanding in William Holbrook at the death of John Jones, and which had subsequently been acquired by the defendant.

An action of ejectment was accordingly brought, and was tried at the last spring assizes for the county of Hereford, when the plaintiffs recovered a verdict, having fully established by their evidence, that the pretended will of John Jones was a forgery, and that the plaintiff, Sarah Jones, was his heiress at law.

The evidence in the cause established that, in the month of July, 1825, notice was given to John Powles, the mortgagee, and the defendant Sarah, his wife, by a solicitor acting on behalf of a party who claimed to be the heir of John Jones, that he had received instructions to institute legal proceedings for the purpose of setting aside the will, on the ground that it was a forgery.

The cause now came on for further directions upon the equity reserved.

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Mr. *Tinney*, for the defendant, contended that the defendant must be considered as standing in the situation of a *bona fide* purchaser for value, in respect of all advances made by her testator, on the security of the mortgaged premises, prior [\*586] to the time when the \*notice of proceedings to impeach the will, on the ground of forgery, was given; and that to the extent of those advances, therefore, she had a right to protect herself by the legal title which she obtained under the conveyance of 1830.

The MASTER OF THE ROLLS, however, intimated an opinion that the protection, afforded by the legal estate, might possibly be confined in equity to such *bona fide* purchasers only as derived their estate from a party who was capable or who, but for some secret act of his own, would have been capable of passing some estate.

Ultimately the cause stood over for a short time, to give counsel an opportunity of looking into and considering the authorities with reference to that distinction.

*June 27th and 28th.*—The argument was now resumed.

Mr. *Tinney* and Mr. *Phillimore* for the defendant:—The root of the defendant's title is the mortgage executed to Watkins in 1821, at the request of James Jones, who claimed to be devisee of the property in fee; and the question is whether, the legal estate having been conveyed in that year by Hall to Watkins, and by him to the defendant in 1830, the latter is not now entitled to protect herself against the claim set up by the plaintiffs, on the ground that she has in her the legal title, and is, to the extent of the advances made by her testator prior to the notice, a *bona fide* purchaser for valuable consideration. Meredith claimed to be, and apparently was seised as devisee in fee; and the party taking under him, and from whom the defendant derives title, produced the document on which Meredith's title was [\*587] founded, namely, the will of John Jones. \*That production could not be notice, either direct or implied, that the will was a void instrument. There is nothing on the face of the document, or in the mode of its attestation, to lead a person to believe that it was informal and invalid, far less that it was a forgery; and it was regularly proved as a will of personal estate in the proper Ecclesiastical Court. That the mere suspicion of fraud will not affect a purchaser, is clear from the doctrines to be deduced from *M<sup>c</sup>Queen v. Farquhar*.(a) But here there was not, and could not be, the least breath of suspicion. The will was

(a) 11 Ves. 467; and see Sugd. V. & P. 322, 7th edit.

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duly attested, and the parties had remained in undisturbed possession under it from the year 1814 until the time when the bill was filed.

No trace of the distinction, suggested by the court, between purchases from vendors who never had any title, and vendors who appear to have, and who, but for some secret act of theirs, would have a title, is to be found in any of the cases; neither is the distinction adverted to, far less recognized, by any of the text writers. On the contrary, the broad and general terms in which the principle is uniformly laid down, that a court of equity will not deprive a purchaser for value, without notice of the protection afforded by the legal estate, apply equally to purchases from a person such as Meredith, who never had in him anything beyond an apparent title, and to purchases from a person who may have possessed, either then or at a former period, some title to, or interest in the property conveyed, although an imperfect and defeasible one. Lord Redesdale<sup>(a)</sup> in speaking of a court in equity being ancillary to the administration of justice in other courts, by removing \*impediments to the fair de- [\*588] cision of the question at law, observes, "This will not be done in every case; for, as the court proceeds upon the principle that the party in possession ought not, in conscience, to use an accidental advantage to protect his possession against a real right in his adversary, if there is any circumstance which meets the reasoning upon this principle, the court will not interfere. Therefore, if the possessor is a purchaser for a valuable consideration, without notice of the title of the claimant, this is a title in conscience equal to that of the claimant, and the court will not restrain the possessor from using any advantage he may be able to gain to defend his possession." So, also, in the marginal note to the title Purchase and Purchaser in the General Abridgment of Cases in Equity,<sup>(b)</sup> it is said, that "in equity a purchaser is considered as a person, who innocently, without fraud or surprise, for valuable consideration, acquires a right or interest, and is, therefore, so far favored and protected, that his title shall not be impeached in equity; no planks that he can lay hold on, and by which he can secure himself at law, shall be taken from him; neither shall he be compelled to discover anything that will weaken his title." There is an early decision that a party would not be allowed to avail himself of this protection, unless he could show he had a title himself; *Seymer v. Nosworthy*.<sup>(c)</sup> But that doctrine was afterwards reconsidered and overruled by Lord Nottingham, in what appears to have been another stage of the same cause; and it was determined that if a person purchased without fraud, upon an apparent title, a court of equity would

(a) Red. Pl. 134, 4th ed.

(c) 2 Freem. 128.

(b) 1 Eq. Ab. 353.

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hold him entitled to the benefit of that protection; *Bassett v. Nosworthy*,<sup>(a)</sup> The language of the \*court in *Bassett v. Nosworthy*, is extremely strong in favor of *bona fide* purchasers. *Turner v. Buck*,<sup>(b)</sup> is another remarkable decision proceeding upon the same principle. In that case, it appears that a settlement had been made, giving an estate to a particular line of heirs; but the settlement not being forthcoming, a person who was in possession under an apparent title sold the estate to a purchaser for value, who had no notice of the settlement. The heir under the settlement, afterwards brought a bill to discover the title of the purchaser, and to compel the surviving trustee of a former settlement, in whom the legal estate was then outstanding, to convey that estate to him. But Lord Chancellor Cowper declared he would not decree the trustee to convey the legal estate to the *cestui que trust*, or compel him to suffer the *cestui que trust* to bring an ejectment in his name, against one who was a purchaser without notice of the former settlement; and his Lordship said it was "a constant rule in equity never to aid any person who claims, by a voluntary settlement, against a fair purchaser without notice; as in case of a disseisor who conveys away the lands upon a valuable consideration, this court will not compel the trustee to convey the legal estate to *cestui que trust*, to enable him to recover the possession at law against the purchaser." The case of *Finch v. The Earl of Winchelsea*,<sup>(c)</sup> shows the length to which courts of equity will go in protecting *bona fide* incumbrances against the secret acts of parties. The principle of those cases was a good deal discussed in *Ex parte Knott*,<sup>(d)</sup> where the question was how far a party, who had advanced money to a bankrupt after the act of bankruptcy, could be entitled to the benefit of the legal estate; and a case was there put \**arguendo*, which goes the whole length of the present case. "If (says Sir Samuel Romilly, in his reply, in *Ex parte Knott*) a mortgagor dies, leaving a will not discovered, and the heir, taking possession and supposing he has the title, makes a second mortgage, could the devisee, when the will came to light, redeem without paying both? Though I do not know that such a case has occurred, there can be no doubt upon the principle." That doctrine is borne out by the language of Lord Eldon in his judgment in the case. *Jerrard v. Saunders*,<sup>(e)</sup> *Wallwyn v. Lee*,<sup>(g)</sup> *The Earl of Buckinghamshire v. Hobart*.<sup>(h)</sup> The principle had been previously recognized and acted upon in the remarkable case of *Stanhope*

<sup>(a)</sup> Ca. Temp. Finch, 102.<sup>(b)</sup> 22 Vin. Ab. 21, pl. 5.<sup>(c)</sup> 1 P. Wms. 277.<sup>(d)</sup> 11 Ves. 609.<sup>(e)</sup> 2 Ves. jun. 454.<sup>(g)</sup> 9 Ves. 24.<sup>(h)</sup> 3 Swan. 186.



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v. *Earl Verney*,<sup>(a)</sup> from which Mr. Butler, in a note to his edition of the First Institute, deduces the general proposition, that "if any person, [who is a purchaser,] unaffected by notice or fraud, takes a defective conveyance or assignment of the fee, or of any estate carved out of it, defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also takes an assignment of a term to a trustee for himself, or to himself, where he takes the conveyance of the inheritance to his trustee; in each of these cases he is entitled to the full benefit of the term; that is, he may use the legal estate of the term to defend his possession during the continuance of the term, or, if he has lost the possession, to recover it at common law, in preference to all claimants prior to his purchase, but subsequent to his term."

The principle is strongly illustrated by the doctrine of courts of equity, with respect to conveyances made by traders to *bona fide* purchasers for value after \*a secret act of [\*591] bankruptcy, or after a commission issued. It is now settled, and is so laid down by Sir E. Sugden,<sup>(b)</sup> on the authority of *Collet v. De Gols*<sup>(c)</sup> and *Hitchcock v. Sedgwick*,<sup>(d)</sup> in the House of Lords, where the decree of the Lords Commissioners was reversed, that neither an act of bankruptcy nor a commission of bankrupt, is notice which will affect such a purchaser. Lord Erskine's decision in *Ex parte Herbert*,<sup>(e)</sup> which is to the contrary as to the latter point, was founded on a misapprehension of the opinions of Lords Eldon and Redesdale, and has not been approved or followed. The effect of a commission is to vest the whole estate of the bankrupt in his assignees, so that after his bankruptcy he would be a mere intruder, having not a particle of interest, and holding, like the parties here who claim under Meredith, by a merely apparent title; and yet in such a case a court of equity will not assist the assignees to recover the estate against a *bona fide* purchaser for value.

The proposition as laid down by Lord Northington in *Stanhope v. Earl Verney* is clear and universal, that "a purchaser without notice for a valuable consideration, is a bar to the jurisdiction of this court, and it is of no consequence when the legal advantage was acquired, if the purchase was made, and the money paid without notice."<sup>(g)</sup>

Mr. Pemberton and Mr. Bethell for the plaintiffs:—The mortgage by Jones to Holbrook was made in December, 1800, and

(a) Stated in Co. Litt. 290 b, note 5, 15, and 2 Eden, 81.

(b) Vend. and Purch. 739, 7th ed.

(c) 13 Ves. 183

(d) Ca. T. Talb. 65.

(e) 2 Eden, 85.

(f) 2 Vern. 156.

was paid off in the year 1808. On that occasion a memorandum of the transaction \*was indorsed upon the mortgage deed, and the fact is expressly referred to in the subsequent mortgage to Hall, to which Holbrook was a party. As soon as the mortgage was paid off, and the memorandum of satisfaction indorsed by Holbrook on the deed, Holbrook ceased to be a mortgagee having a right to transfer his estate to any other party, and became a trustee of the legal estate for John Jones, his heirs and assigns—a trustee constituted, not by implication of law, but by express declaration. John Jones, the mortgagor, died in the year 1814; and upon his death a paper was produced which is called his will, and which appeared to bear date twelve years before his death. Annexed to this instrument, there was no regular form of attestation, no statement that it had been signed, sealed and published in the manner required by the statute; but there appeared upon it what purported to be the names of three subscribing witnesses. It was, therefore, a document, which, though capable of being shown by extrinsic evidence to be a valid instrument, did not, on the face of it, profess to be a good will, and which, unless something could be supplied by parol evidence, was clearly not a good will. This paper was proved as a testamentary instrument in the year 1814; and in the month of February in the following year, before there could be any substantial or continued possession under it, Meredith, the alleged devisee, executed a mortgage, and called for a transfer of the legal estate from Holbrook to Hall, the mortgagee; and the question is, whether parties claiming as purchasers under Meredith, can protect themselves by the legal estate so acquired from Holbrook. Now, Holbrook was a trustee for the real representative of John Jones, that is to say, for the plaintiff, Sarah Jones; and the defendant having acquired, as a purchaser, such interest as Meredith had in the estate, (which interest was, in effect, \*nothing, Meredith being a mere intruder,) has subsequently procured an assignment to herself of the legal estate conveyed in 1814 by Holbrook to Hall.

The points to be considered are, first, whether a purchaser for value can, under any circumstances, avail himself of a legal estate acquired from a trustee, as a protection against the *cestui que trust*; and, secondly, whether such purchaser can do so when he claims under a wrongdoer, who had no connection with, or interest in the estate which he pretended to convey.

No authority has been or can be cited in support of the proposition that a purchaser, claiming from a stranger, may protect himself, notwithstanding he has notice of the trust, by procuring an assignment of the legal estate from a person who holds that estate as a trustee for the real owner; and the doctrine of the

court in *Saunders v. Dehew*(a) is directly to the contrary. It is there distinctly laid down, that "though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust; for, by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust." In the present case Holbrook was not a mere satisfied mortgagee: by the effect of the indorsement on the mortgage deed, he was made an express trustee for John Jones, the mortgagor, and his real representatives; and the conveyance under which the defendant shelters herself was itself a breach of trust, having been made by Holbrook to Hall at the request of Meredith, upon the supposed title given to the latter by a forged instrument, which could constitute no title at all.

\*With respect to the second point, can a single case [\*594] be pointed out which does not fall within the restriction suggested by the court; namely, that a purchaser, in order to protect himself effectually by the acquisition of the legal estate, must be a purchaser deriving his title from a person who, but for some secret act of his, or of those under whom he claims, would have had good right to convey? The only case in which it is suggested that a decision has gone beyond the proposition thus qualified is *Basset v. Nosworthy*;(b) and that, when examined, will be found to fall within the restriction. It is said on the other side, that there is no authority in decided cases for imposing such a limit: but when it appears that, from the Restoration down to the present day, all the cases have contained that circumstance as an ingredient in them, and the only case which was supposed to be otherwise, turns out, upon examination, instead of being an exception, to be consistent with the whole current of the cases, the fact furnishes the strongest authority in favor of the proposition. The cases in bankruptcy have no application to the particular qualification with which the general rule in favor of *bona fide* purchasers is to be understood; for in all of them the bankrupt had, at one time, a good title in himself, and, but for some secret act of his own, namely, the act of bankruptcy, would still have had that title in him, and have been in a condition effectually to convey it. Suppose a person, having notice that there had been an elder son, to have purchased from a second son, on receiving information that such elder son was dead: that would more nearly resemble the present case than any of the cases which have been put on the other side; and yet it will hardly be contended that in the event of the elder son afterwards appearing, the purchaser \*would be [\*595]

(a) 2 Vern. 271.

(b) Ca. Temp. Finch, 102.

1834.—Jones v. Powles.

permitted to defend himself against the claim of such elder son, by procuring an assignment to himself of the outstanding legal estate. *Prima facie*, Meredith had no title. The only mode in which he could acquire one, was by affirming the existence of a fact which had no foundation, namely, the execution of a will in his favor; and the document which he produced to establish that fact, afforded no evidence of it whatever. It was not, on the face of it, a good will; and the question is, whether the defendant, having relied upon that representation without inquiry, can rest her defence upon that circumstance, as if Meredith had actually been the heir at law, and had, therefore, possessed a good title. Here Meredith was a mere intruder, not having even a colorable title; for the title, by virtue of which he entered upon the premises, had not been confirmed by long possession; and a person claiming under an intruder can have no right to set up the legal title to defend himself against the rightful owner. A man may have an equitable interest, and, having that interest, he may, with a view to his protection, clothe it with the legal estate: but if he claims a title derived from one who had himself no title whatever, one who, in fact, was a mere wrongdoer, or disseisor, he cannot afterwards protect himself against the rightful owner by getting in the legal estate; or, if he could so protect himself in any case, it must be by getting in a dry legal estate; not, as in this case, an estate vested in a trustee and coupled with an express trust for the rightful owner.

Mr. Tinney, in reply, observed that Holbrook, after his mortgage money was paid off, stood precisely in the situation of an ordinary trustee of a legal term which has been satisfied, and is held in trust for the equitable owner of the property. *Saunders v. Dehew*, therefore, had no application. It was settled [\*596] by a multitude of \*cases, among others by *Willoughby v. Willoughby*,<sup>(a)</sup> that the circumstance of the legal title having been acquired subsequently to the notice of the fraud was immaterial, provided there was no such notice at the time when the consideration was paid.

The MASTER OF THE ROLLS said, that although the case of a purchase from a mere intruder was included within the principle as laid down by the text writers, yet the principle had never been expressly extended to such cases by decision, and consequently had not been affirmed by authority. His own impression of the rule of equity originally was, that wherever there was a purchaser for valuable consideration, who had been imposed upon by the suppression or concealment of a secret act done by the vendor

(a) 1 T. R. 763.

or by persons claiming under him, such purchaser would be protected by the court; but that this was the limit of the protection. The text writers, however, carried the rule a step further, and laid it down generally that any person who was a purchaser for value without notice had a good title in conscience, and was at liberty to protect himself by the legal estate. He was disposed to adopt the principle thus laid down by the text writers, as being the soundest and safest principle to follow; and to hold that a purchaser for valuable consideration generally might take advantage of the rule, by getting in the legal estate subsequently, though he did not come under the description of a person who had been deceived by the misrepresentations of the vendor or of those claiming under him, but had been deceived by the falsification of facts, and so induced to advance his money. The objections grounded on the informality of the will in point of attestation were untenable. Although not framed with due \*attention to technical rules, the will was an instrument [\*597] which, if genuine, would be sufficient to pass freehold estate by devise under the statute. The facts that the testator executed the will, and that the witnesses subscribed their names to it in his presence, were facts not dependent on the attestation for proof, but of which the court was to be satisfied by extrinsic evidence; and there was nothing on the face, or in the form of the instrument, which could amount to notice to a purchaser from the devisee under it, that the will had not the operation which it purported to have. This was his present opinion; but as the general question was extremely important in its possible consequences, and in the amount of property which it might affect, he should take a short time to consider his judgment.

*July 7th.*—THE MASTER OF THE ROLLS:—The defendant is a purchaser for valuable consideration from persons claiming title under Meredith, who entered into possession of the property in question as the devisee of Jones, the rightful owner.

The legal estate was outstanding in a satisfied mortgagee under Jones; and the mortgagee, by the direction of Meredith, whom he believed to be such devisee, conveyed the legal estate to Hall, by way of better security to Hall for money advanced by him, by way of mortgage, to Meredith. Meredith died in possession, having devised the property to his wife, who devised by the parties under whom the defendant claims as a purchaser for valuable consideration. The conveyance to Hall by the satisfied mortgagee of Jones recites the fact of the mortgage, and that it was satisfied, and that Meredith was the devisee of Jones, and that the conveyance of \*the legal estate to Hall was [\*598] made by the direction of Meredith. Meredith, there-

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 1834.—Webb v. The Earl of Shaftesbury.
 

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fore, and those who claim as volunteers under him, could have no title against the plaintiff as heir at law of Jones.

The question is, whether the defendant, claiming as a purchaser for valuable consideration, without notice of the plaintiff's title as heir, can protect herself by the legal estate which she has acquired by the conveyance from Hall.

My impression at the opening of this case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice, was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed; but, upon full consideration of all the authorities which have been referred to, and the *dicta* of judges and text writers, and the principles upon which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title, asserted by the vendor or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence.

That is the situation in which the defendant stands. There was no reasonable ground for suspicion that the will was forged: a long possession had followed the alleged devise, and no reasonable diligence could have led to a discovery of the forgery.

[\*599] \*I must, therefore, declare, that, as to all sums of money advanced by the defendant on the security of this property previously to notice of the forgery, she is to be considered as a purchaser for valuable consideration without notice; and the accounts between the parties must be taken upon that principle.

Reg. Lib. A. 1833, fol. 1402.

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#### WEBB v. THE EARL OF SHAFTESBURY

ROLLS.—1834: 10th and 11th July.

A testator devised the lands to be purchased with the proceeds of certain estates sold in his lifetime, to the use of trustees and their heirs, upon trust, to pay the rents and profits to his daughter, whether married or unmarried, for her separate use, and not subject to the debts or control of any husband; and after her decease, upon further trust, to convey the lands to such persons and for such uses, estates, and interests as his daughter should by will, attested by three credible witnesses, and whether married or single, appoint; and for want of such, upon trust, to convey the freehold and inheritance of the lands to the right heirs of his daughter: and the testator further directed, that as to so much of such proceeds as should not have been laid out in lands, the trustees should invest the same in the public

funds, and pay the dividends into the proper hands of his daughter, during her life, for her sole use and benefit, whether married or unmarried, and not subject to the debts or control of any husband; and after her decease, upon further trust, to pay and transfer the same to such persons, and for such intents and purposes, and in such manner as she should, by her last will and testament, and whether sole or covert, appoint; and in default thereof, in trust, to pay, transfer and assign the same to the executors or administrators of his daughter. After the testator's death lands were purchased, and were conveyed to the trustees of his will, upon the trusts and for the purposes expressed and declared in the will. A contract having been subsequently entered into by the trustees for the sale of those lands, it was held, that the trustees, with the concurrence of the testator's daughter, could make a good title to the purchaser.

ANTHONY, Earl of Shaftesbury, by his will, dated the 21st of October, 1809, reciting the sale, made by the trustees of his marriage settlement, of certain of his estates in the county of Durham, comprised in the settlement, and that the purchase money, amounting to the sum of 105,000*l.*, had been invested in the sum of 106,858*l.* 6*s.* 2*d.* navy 5 per cents., devised, directed \*and appointed that all such manors, lands and hereditaments as should, pursuant to the trusts of his marriage settlement, be purchased with the said 105,000*l.*, or with the proceeds of the sale of the navy 5 per cents., should stand limited to Francis, Earl of Moira, and George, Earl of Dunmore, their heirs and assigns, to the use of trustees, their executors, &c., for 1,000 years, upon trust, to raise the sum of 20,000*l.* for the portions of Lady Barbara Ashley and any younger children, to be paid in such manner, and at such time, as therein mentioned; and in default of issue male by his wife, the Countess Barbara, and subject to the said charge, and to the life interest thereby given to the said countess, the testator directed and appointed all the manors, lands and hereditaments so to be purchased, unto and to the use of his said trustees, their heirs and assigns, upon trust, after discharging certain out-goings and expenses, to pay the surplus rents and profits to his daughter, Lady Barbara Ashley, whether married or unmarried, for her sole and separate use and benefit, and not to be subject to the debts, control or engagements of any husband she might thereafter marry, and her receipt alone to be a sufficient discharge to the trustees; and after the decease of his daughter, upon further trust, to convey and assure the lands and hereditaments so to be purchased, to such person and persons, and for such uses, estates and interests, as his daughter should, by will, executed in the presence of and attested by three credible witnesses, and whether married or single, devise, direct or appoint; and for want of such, then in trust to convey and assure the freehold and inheritance of all and singular the hereditaments and premises that should be so purchased unto and to the use of the right heirs of his daughter. And as to so much of the navy 5 per cents. as should not have been paid in discharge of the said portion of \*20,000*l.*, or laid out in the pur- [\*601]

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chase of lands as aforesaid, the testator directed that his said trustees should place the same out in the public funds, and (subject to the said charge of 20,000*l.* and to the life interest thereby given to the Countess Barbara therein) should pay the interest and dividends thereof into the proper hands of his said daughter during her life, for her sole use and benefit, whether married or unmarried, and not subject to the debts, control or engagements of any husband she might thereafter marry, and her receipt alone to be the only proper discharge to the trustees; and upon further trust, to pay and transfer or assign the same, immediately after the decease of his said daughter, to such person or persons, and for such intents and purposes, and in such manner as she should, by her last will and testament in writing, or any instrument in the nature of her last will, and whether sole or covert, bequeath, direct or appoint, as personal estate; and in default of such last will or instrument in the nature of a will, in trust to pay, transfer and assign such residue, or the funds and securities in which the same should be invested, to the executors or administrators of his daughter. The will then contained a proviso, that it should be lawful for his trustees, with the consent in writing of his wife, the Countess Barbara, and Lady Barbara Ashley, and, after the decease of the countess, of Lady Barbara Ashley alone, to lay out all or any portion of the navy 5 per cents., or the money to be produced thereby, in the purchase of freehold lands in England, and to settle and assure the same, in the names of the trustees and their heirs, to the use of the countess for life; and, after her decease, to the use of his trustees, their heirs and assigns, upon trust, to pay the surplus rents and profits thereof (after deducting certain out-goings and expenses) unto Lady Barbara Ashley, during her life, and [\*602] whether married or unmarried, for her sole and \*separate use and benefit, independent of any husband she might marry, and not subject to his debts, control or engagements; and her receipt alone to be a sufficient discharge to his trustees; and on further trust that, after the decease of the survivor of his said wife and daughter, they, his trustees, their heirs or assigns, should convey and assure the hereditaments and premises that should be so purchased, to such person and persons, and for such uses, &c., as his said daughter, by her last will and testament, or any instrument in the nature thereof, executed in the presence of and to be attested by three credible witnesses, and whether married or unmarried, should devise, direct or appoint; and for want of such, then, in trust, to convey and assure all such freehold lands and hereditaments as should be so purchased, unto and to the use of the right heirs of Lady Barbara Ashley.

The testator died on the 14th of May, 1811, and left no issue



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other than his said daughter, Lady Barbara Ashley, who afterwards became the wife of the Honorable William F. S. Ponsonby.

In pursuance of the directions contained in Lord Shaftesbury's will, the trustees of that will, after the death of the Countess Barbara, with the requisite consent, laid out part of the purchase moneys of the Durham estates in the purchase of the manor of Holton; and other part of the same purchase moneys was subsequently, with the like consent, laid out in the purchase of the perpetual advowson of the vicarage of Great Canford; and the conveyance of the said manor and advowson respectively, was made to the trustees and their heirs, upon such trusts, and for such intents and purposes, and under and subject to such powers, provisos, limitations and restrictions as in and by the before\*stated will of Anthony, Earl of Shaftesbury, were [\*603] expressed and declared or directed to be limited concerning the manors, lands and hereditaments thereby directed to be purchased with the said 106,858*l.* 6*s.* 2*d.* navy 5 per cent. annuities, or with the money to be produced thereby, or such and so many of the same trusts as were then subsisting, undetermined and capable of taking effect.

The trustees, under the will of Sir John Webb,<sup>(a)</sup> having entered into a contract for the purchase of the manor of Holton and the advowson of the vicarage of Great Canford from the trustees of the Earl of Shaftesbury's will, subject to the approbation of the court, a reference was directed to the Master to inquire and state whether a good title could be made to those estates.

The Master, by his report, found that the trustees of the will had no power, either with or without the consent of Lady Barbara Ponsonby, to convey the fee simple and inheritance in the said manor and advowson, inasmuch as the power by such will given to them to lay out and invest the trust moneys in the purchase of real estates did not authorize the change of securities; and Lady Barbara Ponsonby was merely tenant for life of the manor and advowson, with a power of disposing thereof by will only, and not by deed to take effect in her lifetime.

Lady Barbara Ponsonby and her husband took an exception to the Master's report.

\*Mr. *Bickersteth*, Mr. *Preston* and Mr. *Pole* for the [\*604] exception:—The direction, that in default of any appointment by Lady Barbara Ponsonby's will, the trustees shall convey to her right heirs, does not create an executory trust under which the person who may happen at her death to fill the character of her heir would take as a purchaser, and be entitled to call for a conveyance; but is merely an equitable limitation of the old estate.

<sup>(a)</sup> See *Webb v. Lord Shaftesbury*, 6 *Mad.* 100.

This is placed beyond the possibility of doubt by reference to the corresponding clause in the will, which deals with the trust fund so long as it remains personal estate. That fund is vested in trustees for the separate use of Lady Barbara for life, with a power of appointment to her by will, and for want of such appointment, to her executors or administrators, and not to her next of kin. Under that clause, Lady Barbara became, in effect, absolute owner of the fund, and able to dispose of it in her lifetime, so long as it continued in the shape of personalty; (a) and the testator's intention must have been the same with respect to the extent of the interest which she was to take in the property, in the event of its being converted into real estate. In either case, equally, Lady Barbara was the sole object of her father's bounty; and his only motive for limiting the lands to be purchased to trustees for her separate use, must have been to protect her against the marital influence. Her estate, then, in the lands, is an equitable interest: and the limitation in favor of her heirs being also of an equitable interest, the two estates, by the operation of the rule in *Shelley's case*, unite, so that Lady Barbara has in her the equitable fee, subject to a power to be exercised [\*605] by will, and that power is capable of \*being extinguished by a release. Her fine, therefore, according to the old law, or a deed executed under the provisions of the late act of Parliament, (b) will effectually destroy her power, and enable her to make a good title to a purchaser. The circumstance that Lady Barbara's life estate is an estate to her separate use, is no impediment to the application of the rule in *Shelley's case*; *Ferne on Contingent Remainders*; (c) *Morgan v. Morgan*. (d)

Mr. *Lynch*, for the purchasers, the trustees under the will of Sir John Webb:—The question is, whether Lord Shaftesbury intended the direction that the lands to be purchased with the navy 5 per cents. should, in default of appointment by Lady Barbara's will, be conveyed to her heirs, to operate as words of purchase; and, upon the language of the limitation itself, there is considerable room for contending that he did. If freehold estates were purchased, and a settlement were to be executed in pursuance of this trust, the conveyance would be made to trustees for Lady Barbara, upon trust to pay the rents and profits for her separate use for life, and, after her decease, to convey the estates to such persons as she should appoint by will, and in default of such appointment, to her heirs at law; *Roberts v. Dixwell*. (e) Under such a settlement, when executed, though Lady Barbara would only have an equitable life estate, the estate taken

(a) *Kirkpatrick v. Capel*, Sugd. on Powers, Vol. I, p. 79, 6th ed.

(b) 3 & 4 W. IV, c. 74.

(d) 5 Mad. 408. And see *Pitt v. Jackson*, 2 Bro. C. C. 51.

(c) Page 56, 8th ed.

(e) 1 Atk. 607.

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by her heirs would be a legal estate, and the rule in *Shelley's case* would not apply; *Penne v. Peacock*, (a) *Parkes v. White*. (b) It would seem that \*the testator, by giving to his daughter a power of disposition by will, meant to restrict her to that mode of disposition only. If that be so, and if the words of the limitation over support and justify such a construction, no inference of a contrary kind can be drawn from the fact, that by intendment of law the interest which she took in the case of the personal estate would amount to an absolute interest.

*July 11th.*—THE MASTER OF THE ROLLS:—If the purchase money had remained uninvested in land, the effect of the limitations in the testator's will is expressly to give it, not to the next of kin, but absolutely to Lady Barbara. It is reasonable to infer that the testator's intention was the same whether it continued in the shape of money, or was invested in land; and the limitation to the right heirs of Lady Barbara, must therefore be considered, not as words of purchase, but as words of limitation; and Lady Barbara may, by a fine, extinguish the power, and make a good title

Exception allowed.

(a) *Ca. Temp. Talb.* 41.(b) 11 *Ves.* 209.\**BARHAM v. THE EARL OF THANET.*

[\*607]

ROLLS.—10th, 11th and 26th July.

A mortgage is made of the manor and lands of S. and other valuable estates, to secure a debt of 80,000*l.*, and interest. The mortgagor dies intestate, leaving the debt wholly unpaid; and his heir being pressed to pay off 30,000*l.*, part of the 80,000*l.*, procures a person to advance the sum required for the purpose, and the original mortgagee thereupon joins with the heir of the mortgagor, in a deed conveying the manor and lands of S. to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption altogether different from the prior equity of redemption, and the interest reserved being 5 per cent. instead of 4 1-2 per cent., which was the rate reserved in the original mortgage. This is, in effect, a new mortgage by the heir, and the 30,000*l.* is thereby constituted his personal debt.

The same mortgagor made another mortgage of gavelkind lands, which, upon his death intestate descended to his two brothers as co-parceners. The elder brother, who was a common law heir of the mortgagor, purchased of the other brother his moiety of the gavelkind lands, and covenanted with him to pay the whole mortgage money. He did not thereby make the mortgage money his personal debt.

By indentures of lease and release, bearing date respectively the 29th and 30th of January, 1823, the manor and lands of Silsden, together with divers other messuages, farms and hereditaments in the county of York, which were then the property of Sackville, Earl of Thanet, were, in consideration of 80,000*l.* advanced and paid to him by Lord Petre, conveyed to Lord Petre

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in fee; subject to a proviso for redemption on payment, after the expiration of twelve months, by Sackville, Earl of Thanet, his heirs, executors, administrators or assigns, to Lord Petre, his executors, administrators or assigns, of the said mortgage debt or sum of 80,000*l.*, with interest after the rate of 4 1-2 per cent. per annum, payable at the several times therein mentioned.

Shortly afterwards, upon the marriage of Lord Petre, one undivided fifth part of the property comprised in the mortgage, was conveyed to the trustees of his Lordship's marriage settlement, for the better securing the sum of 15,000*l.*, being part of the mortgage debt, thereby assigned to them.

[\*608] \*Sackville, Earl of Thanet, died in the month of January, 1825, intestate and without issue, leaving Charles, the late Earl of Thanet, and Henry, the present Earl of Thanet, his only brothers; and the equity of redemption of his manor and lands of Silsden, and of his other Yorkshire estates, descended upon Charles, Earl of Thanet, who was his heir at law, and who also took out letters of administration of his personal estate. The personal estate left by Sackville, Earl of Thanet, proved insufficient for the payment of his debts.

Some time afterwards, Lord Petre became desirous that 80,000*l.*, part of this mortgage debt, should be paid off; and as it was not then convenient for Charles, Earl of Thanet, to pay the money himself, an arrangement was entered into for that purpose, between the Earl of Thanet, and William Joseph Denison, Esq., who undertook to advanced the required amount. The terms of the arrangement were, that interest at the rate of 5 per cent. per annum, should be allowed upon the sum advanced by Mr. Denison; that a proportionate part of the debt of 80,000*l.* should be assigned to him; that a conveyance, by way of mortgage, of the manor and lands of Silsden (being part of the hereditaments comprised in the mortgage of January, 1823,) should be made to Mr. Denison in fee, discharged of the residue of the original mortgage debt; and that the Earl of Thanet, should also give his bond to secure the repayment of the money.

A bond was accordingly executed by Charles, Earl of Thanet, to Mr. Denison, in the penal sum of 60,000*l.*, to secure the payment of the sum advanced by the latter, with interest. And by indentures of lease and release, dated the 22d and 23d of June, 1827, respectively, and in which the trustees of Lord Petre's settlement joined as parties, in consideration of 80,000*l.* paid [\*609] \*by Mr. Denison to Lord Petre, at the request and by the direction of Charles, Earl of Thanet, all that sum of 80,000*l.* and interest, being part of the mortgage debt of 80,000*l.*, was assigned by Lord Petre to Mr. Denison, and the entirety of the manor and lands of Silsden, was conveyed by Lord Petre and the trustees, and Charles, Earl of Thanet, to Mr. Denison in

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fee: subject to a proviso, that if Charles, Earl of Thanet, his heirs, executors, &c., should pay to Mr. Denison, his executors &c., the principal sum of 30,000*l.* on the 23d of June, in the year 1832, with interest at the rate of 5 per cent., by equal half yearly payments, on the 23d of December, and the 23d of June, in each year, (being the same days as were appointed for that purpose, in the condition of the bond,) until payment of the principal sum, then, or at any other time thereafter, Mr. Denison, his heirs or assigns, should, upon the request of Charles, Earl of Thanet, his heirs, executors or administrators, reconvey to Charles, Earl of Thanet, his heirs or assigns, the manor and lands of Silsden, free and discharged from the said sum of 30,000*l.* And it was thereby further provided that if, at any time whilst the principal sum, or any part thereof continued outstanding upon that security, the interest or any part thereof, should be in arrear for forty days next after any of the half-yearly days of payment, then, and immediately thereupon, such principal sum and interest, should no longer be payable at the several times therein before for that purpose appointed, but the same should forthwith become payable to and recoverable by Mr. Denison, his executors, &c., as a present debt, if he or they should so think fit. And it was further provided that if Charles, Earl of Thanet, his heirs, executors, &c., did and should for the whole period of five years, during which the said sum of 30,000*l.* was agreed to remain outstanding upon that security, duly pay to Mr. \*Denison, [\*610] his executors, &c., the interest from time to time accruing due upon the principal sum, on the several days appointed for that purpose, or within forty days afterwards, then it should be lawful for Charles, Earl of Thanet, his heirs, executors, &c., (if he or they should so think fit,) to continue the principal sum at interest upon the same security, for the further period of two years, from the said 23d day of June, 1832. And Charles, Earl of Thanet, thereby also covenanted for himself, his heirs, executors, &c., to pay the principal sum of 30,000*l.* and interest, at the times and in the manner before mentioned.

The days on which the 5 per cent. interest was made payable half-yearly upon Mr. Denison's mortgage, were different days from those on which the 4 1-2 per cent. interest was stipulated to be paid, under the original mortgage to Lord Petre.

Subsequently to the execution of these indentures, and before the end of the year 1831, Charles, Earl of Thanet, paid off the whole of the sum originally due on the mortgage to Lord Petre, with the exception of the 30,000*l.* advanced by Mr. Denison, and took a conveyance to himself in fee of all the property comprised in the mortgage of January, 1823, except that portion of it which consisted of the manor and lands of Silsden mortgaged to Mr. Denison.

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Besides his Yorkshire property, Sackville, Earl of Thanet, was possessed of large estates in the county of Kent, some of which being of gavelkind tenure, upon his death intestate and without issue, descended on his two brothers, Charles, the late earl, and Henry, the present Earl of Thanet, as co-heirs in gavelkind. At the time of the death of Sackville, Earl of Thanet, the whole of his Kentish estates, including as well those which [\*611] \*were not of gavelkind tenure, were subject to several mortgages, and, among others, to a mortgage for a long term of years, which had been created by Sackville, Earl of Thanet, for the purpose of securing the repayment of 32,900*l.* and interest to his sister, Lady Elizabeth Tufton.

By indenture, bearing date the 28th July, 1828, made after the death of Sackville, Earl of Thanet, between the Honorable Henry Tufton, now Earl of Thanet, of the one part, and Charles, then Earl of Thanet, of the other part, after reciting the several mortgages to which the Kentish estates of Sackville, Earl of Thanet, were subject at the time of his death, and reciting that Charles, Earl of Thanet, had contracted with the Honorable Henry Tufton, for the absolute purchase of his moiety of all such parts of those estates as had descended to Charles, Earl of Thanet, and the Honorable Henry Tufton, as co-parceners, by the custom of gavelkind, subject to such proportion of the several mortgage debts, and of all other debts owing by Sackville, late Earl of Thanet, as the Honorable Henry Tufton, was, or would otherwise have been liable to pay, (which proportion, with reference to Lady E. Tufton's mortgage, was estimated at the sum of 4,112*l.* 10*s.*, being one-eighth of the whole amount due upon that mortgage,) the Honorable Henry Tufton, in consideration of the sum of 11,790*l.* 3*s.*, and of an annuity of 1,600*l.* during his life, the due payment whereof had been secured by the bond of Charles, Earl of Thanet, and also in consideration of the payment to be made by Charles, Earl of Thanet, of such proportion of the mortgage debts charged on the said estates, as the Honorable Henry Tufton was liable to pay, conveyed and assured all the manors, messuages, lands and hereditaments, situate in the county of Kent, of, or to which Sackville, late Earl of Thanet, was seised or entitled at his decease, [\*612] \*subject to the mortgage debts and the securities for the same, to Charles, Earl of Thanet, his heirs and assigns forever.

Charles, Earl of Thanet, afterwards paid off the whole of the principal and interest due in respect of the several incumbrances on the Kentish estates, with the exception of Lady Elizabeth Tufton's mortgage. He died in the month of April, 1832, intestate, and without issue, and left his brother Henry, now Earl of Thanet, (who was his heir at law,) and his sisters, Lady Caroline Barham (since deceased) and Lady Elizabeth Tufton, his next of

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kin. Letters of administration of his personal estate were taken out by the present earl. The only mortgage debts of Sackville, Earl of Thanet, which were outstanding at the death of Charles, Earl of Thanet, were the 30,000*l.*, charged on the manor and lands of Silsden, in favor of Mr. Denison, and the 32,900*l.* due to Lady Elizabeth Tufton on the security of the Kentish estates.

The bill, which was filed by John Barham as assignee and personal representative of his mother, Lady Caroline Barham, against Henry, Earl of Thanet, and Lady Elizabeth Tufton, prayed a declaration that the personal estate of Charles, Earl of Thanet, was not liable for, and ought not to be applied in payment of the mortgage debt of 30,000*l.*, due to Mr. Denison, or the sum of 4,112*l.* 10*s.*, being the apportioned part of the mortgage debt due to Lady Elizabeth Tufton; but that those two sums, and the interest thereon, ought to remain charged and be paid out of the estates respectively subject thereto, in exoneration of the personal estate.

The defendant, Henry, Earl of Thanet, by his answer, stated that the personal estate of Charles, Earl of Thanet, was much more than sufficient to pay his funeral \*expenses [\*613] and all his just debts, including the sum of 30,000*l.*, due to Mr. Denison, and the sum of 4,112*l.* 10*s.*, (being the one-eighth of the sum due to Lady E. Tufton,) which the defendant submitted should be considered and paid as just debts of Charles, Earl of Thanet. The defendant further submitted, that Charles, Earl of Thanet, by the several acts and deeds before mentioned, and especially by applying to and borrowing from Mr. Denison, the sum of 30,000*l.*, by making and executing the indenture of mortgage of the 23d of June, 1827, and by the bond and covenant for payment of the moneys therein mentioned, rendered himself personally liable for the payment of that sum; and he further submitted, that Charles, Earl of Thanet, by the indenture of the 28th of July, 1828, took upon himself the payment of the sum of 4,112*l.* 10*s.*, and made his personal estate the primary fund to satisfy that debt.

There was some evidence in the cause to show that Charles, Earl of Thanet, had had it in contemplation, shortly before his death, to pay off Mr. Denison's mortgage as soon as the day of redemption stated in the mortgage deed should arrive; and that, with that view, he had been accumulating a large sum of money at his bankers, which was lying in their hands at the time of his decease.

Mr. Rolfe and Mr. John Romilly for the plaintiff:—The first question relates to the 30,000*l.* due to Mr. Denison, and which, as the plaintiff contends, is primarily a charge upon the mortgaged property, and ought not to be satisfied out of the personal

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estate of Charles, Earl of Thanet. The rule is well established, that if a man seised of land in fee mortgages the land, and then dies intestate, so that the equity of redemption descends [614] upon \*his heir, and the heir afterwards dies without having paid off the mortgage, the land in the hands of the heir or devisee of that heir is held *cum onere*; in other words, the land itself, and not the personal estate of the heir of the mortgagor is the primary fund for payment of the debt. It is also well settled, that even if the heir of the mortgagor joins in a transfer of the security to a new mortgagee, and gives to such mortgagee his own bond or covenant for payment of the money, the security, which he thereby creates, is auxiliary and collateral only; the property in mortgage still remaining the primary fund; *Bagot v. Oughton*, (a) *Basset v. Percival*, (b) In *Mattheson v. Hardwicke*, (c) before Lord Kenyon at the Rolls, a promissory note, given by the devisee of an estate for the amount of a legacy charged on the devised estate, was held, as between the heir and personal representative of the devisee, not to have altered the liability, and the devised estate was treated as the primary fund. The doctrine of the court upon this subject, is clearly laid down by Lord Alvanley, in *Woods v. Huntingford*, (d) where, speaking of a real estate subject to a mortgage, his Lordship says, "If a person succeeding to an estate of that kind, has done no act to adopt the debt and make it his personal debt, his personal estate is not liable; but if by his acts he has put himself so far in the place of his ancestor as to make the debt his own, that is understood to be the same as if he was the original mortgagor: but the court has been extremely anxious not to make that inference, unless where it is perfectly clear and obvious; therefore, though, the mortgagee pressing for his money, the heir is obliged to have a transfer of the mortgage, and as every one knows, no assignee will take it without some personal covenant, [615] \*upon that transaction he executes a bond to the new mortgagee; if he does it only for that purpose, not meaning to make himself more liable, it has been determined not to make it the personal debt of the party, whose original debt it was not." This doctrine is founded on the reasonable principle, that as the personal estate of the heir has not been increased or benefited by means of the mortgage, so it shall incur no liability in respect of it, unless the heir has, by some clear and unequivocal act of his, adopted the debt and made it his own. That principle is strictly applicable here. The personal estate of Earl Charles, derived no advantage from the arrangement under which 30,000*l.* of the original mortgage debt was transferred to Mr. Denison, to whom the bond and covenant of Earl Charles, given

(a) 1 P. Wms. 347.

(b) 1 Cox, 288.

(c) 2 P. Wms. 665, note.

(d) 3 Ves. 128.



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at the time of the transfer, were merely an auxiliary security. The result might have been different, if, as in *Lushington v. Sewell*, (a) the heir had increased the amount of the debt by borrowing a further sum, and giving a new mortgage for the whole; for then his personal estate would have derived a direct benefit from the contract, which would indeed be an entirely distinct and independent transaction. Reliance may, perhaps, be placed on the fact, that the deed by which a portion of the mortgage debt was transferred to Mr. Denison, creates a new equity of redemption, and stipulates for a different and higher rate of interest; but in every case of the transfer of a mortgage, it is obvious that a new equity of redemption must be reserved; and *Shafte v. Shafte*, (b) is a direct authority for holding, that, on the transfer of a mortgage, any alteration in the rate of the interest, whether an increase or a diminution, is immaterial. The language of Lord Thurlow's judgment in that case is conclusive of the present question.

\*With respect to the sum of 4,112*l.* 10*s.*, charged [\*616] upon the gavelkind estates sold by Henry, now Earl of Thanet, to the last earl, it is impossible to distinguish the case from *Tweddell v. Tweddell*, (c) and *Woods v. Huntingford*. (d) The transaction was a mere sale of his interest in those estates, subject to the charge; and the purchaser did no more than indemnify the vendor against being called upon to pay the debt. Lady Elizabeth Tufton, the mortgagee, was no party to the contract; and her position could not be affected by it, either for the better or the worse. There is no covenant on the part of Earl Charles to pay the proportion of the debt charged on Henry's share of the descended estates; and, in point of fact, as Henry was not liable personally to pay any part of it, the recital of the payment, to be made by Earl Charles, of such proportion of the mortgage debts as Henry was liable to pay, as part of the consideration, was founded on a total misapprehension; and seems to have been made merely for the purpose of enabling the parties to make a proper apportionment of the stamp duty.

Mr. *Bickersteth* and Mr. *Richards*, for the defendant, Lady E. Tufton, who had the same interest with the plaintiff.

Mr. *Pemberton* and Mr. *Stuart*, for the defendant, the Earl of Thanet:—This is purely a question of intention. Every case must depend upon its own specialties; and the authorities are only applicable to the extent of determining what particular circumstances shall be held sufficient to warrant the inference of intention. In order, therefore, \*to arrive at a [\*617]

(a) 1 Sim. 435.

(b) 1 Cox, 207

(c) 2 Bro. C. C. 101.

(d) 3 Ves. 128.

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just conclusion, it is necessary to attend minutely to all the facts of each case, to the peculiar\*frame and language of the subsequent contract, and to the situation in which the new contracting party places himself, so as to be able to collect from the whole of his dealings, whether his intention was, that his personal or his real estate should be primarily charged; *Donisthorpe v. Porter*, (a) *The Earl of Oxford v. Lady Rodney*. (b)

With respect to the first point; the question is not, whether there has been any addition to the mortgage money, but whether the transfer in substance amounts to a new contract—new in its terms, and differing essentially in its character from the former. In *The Earl of Roxford v. Lady Rodney* there was no increase to the debt, and no new mortgage taken for a larger sum; and yet Sir W. Grant—from the facts that the mortgagee was a party to the sale of the house, that the purchaser entered into a personal engagement with him, and that a new and special equity of redemption was reserved—considered himself entitled to infer that the purchaser meant to make the mortgage his own personal debt, and therefore to hold that the personal estate was primarily liable to pay it. Here the circumstances are much stronger than they were in *The Earl of Roxford v. Lady Rodney*; for here Earl Charles, in order to raise the sum without which Lord Petre would have foreclosed his mortgage or compelled a sale of the estate, entered into a treaty with a new mortgagee, gave his own personal security for the debt, and consented to pay a higher rate of interest; the property subject to the new mortgage was confined to a part only of that which was comprised in the original mortgage; the days on which the interest was made payable were different\*from those specified in the original mortgage; and what is still more important, the mortgagor deprived himself of the power of redeeming the property for a period of five years. With what justice or propriety can it then be said that this was not a new and independent contract? By the effect of the transaction, the possession and liability of Earl Charles, were entirely altered; and the debt, which had previously been a mere charge upon the lands which he inherited from his brother, was made his own personal obligation, to the exoneration of the descended estate. That such was the desire and understanding of Earl Charles, is manifest from every part of his proceedings. In the course of a few years after the death of Earl Sackville, he cleared off the whole of the incumbrances affecting the Yorkshire estates, with the exception of Mr. Denison's mortgage; and the evidence shows that he fully intended to discharge that incumbrance likewise, at the earliest possible moment which the terms of the contract permitted; and

(a) Amb. 600: 2 Eden, 162.

(b) 14 Ves. 417.

that he was only prevented from fulfilling that intention by his sudden and premature death; a very few months before the stipulated period for redemption had arrived. It may be conceded that his personal estate derived no benefit from the transaction with Mr. Denison; but that circumstance is quite immaterial, because the nature of the transaction itself indicates a clear intention, on the part of Earl Charles, to adopt the debt as his own personal obligation. There can be no equity in favor of one fund against another, where the same individual is the owner of both. In *Lushington v. Sewell*, it is true, an addition was made to the amount of the sum for which the fresh mortgage was given: but that was an accidental and unimportant circumstance, and formed no part of the grounds on which the case was argued or determined; the principle of the decision being, that the transaction was essentially a new \*and independent con- [\*619] tract. The cases of *Mattheson v. Hardwicke* and *Bassett v. Percival* have no application. *Bassett v. Percival* was a mere case of suretyship; there was no borrowing or lending of money; but the estate being subject to a charge, the heir gave his bond as a collateral security to the creditor. *Tweddell v. Tweddell* and *Shafto v. Shafto* are not to be reconciled with the decision of Lord Hardwicke in *Parsons v. Freeman*, (a) or with the language of Lord Northampton in *Donisthorpe v. Porter*. *Tweddell v. Tweddell* was doubted, if not disapproved, by Lord Alvanley, in *Butler v. Butler*, (b) and by Lord Roslyn in *Waring v. Ward*, (c) as well as by Sir W. Grant in *The Earl of Oxford v. Lady Rodney*; and *Shafto v. Shafto*, which is an extremely doubtful case, does not seem to have been ever made the subject of judicial comment or consideration. Even there, however, the circumstances were infinitely less strong for exonerating the real estate than they are in the present case.

With respect to the second point, it appears from the terms of the deed of July, 1828, that it was part of the contract between Earl Charles and his brother, the present earl, that the whole of the debts of Earl Sackville should be paid by Earl Charles; and the undertaking the burden of those debts, so far as they constituted a charge on the estates descended upon Henry, formed part of the price paid to the latter as the consideration upon which the contract was made. This, therefore, was not a mere purchase of the equity of redemption, (which would not make the mortgage primarily a charge on the personal estate,) but an agreement, on the part of Earl Charles, that the amount of \*the mortgage money should be considered as his own [\*620] personal debt.

(a) Amb. 115; 3 Atk. 741.

(b) 5 Ves. 534.

(c) 7 Ves. 332.

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Mr. *J. Romilly* in reply :—It cannot be contended that this is purely a question of intention. The real principle is this that, as the personal estate of the intestate has never had the benefit or the money raised on the real estate, so it shall not bear the expense of repaying it, unless facts occur from which an irresistible inference arises, that the intention of the intestate was, that his personal estate should be primarily charged, and the real estate exonerated. The facts from which the court will infer this intention are different in the two classes of cases wherein this question may arise; and it is important to attend to this distinction, as without it the cases on the subject cannot be reconciled, and with it, they are all consistent. An instance of both kinds occurs in the case before the court. The first class is where a person dies intestate, leaving real estate subject to a mortgage, and the heir of that intestate himself dies intestate; and the question then arises, as between the heir and the next of kin of the second intestate, whether the personal estate of the second intestate or the mortgaged estate is to bear the expense of paying off the mortgage debt. The second class is, where a person buys an estate subject to a mortgage not created by himself, and then dies intestate; and the same question then arises between his heir and his next of kin. To raise the first class of questions, two intestacies must occur; to raise the second, but one. In the former, where the heir of the first intestate has raised money to pay off the mortgage, the court considers that neither personal covenants nor an alteration of interest, nor any similar circumstance, justifies the inference that he intended his personal estate to [\*621] \*bear the debt; but draws such an inference under these circumstances only, namely, that, if the heir of the first intestate has increased the amount of the mortgage debt, and entered into a personal covenant to pay the whole, then, as his personal estate has clearly had the benefit of part, equity will not distinguish which part, but will infer that he intended his personal estate to be primarily liable for the whole debt; and, accordingly, upon his death, hold that his heir is entitled to have the personal estate of the second intestate applied in liquidation of the mortgage. This principle is contradicted by no case, and is specially laid down in *Woods v. Huntingford* and *Tweddell v. Tweddell*. The case of the *Earl of Oxford v. Lady Rodney* is no authority to the contrary, but is an instance of the second class of cases; and there, also, an arrear of interest was added to the amount of the mortgage debt. *Donisthorpe v. Porter* is too loosely reported to be any authority either way. Apply this principle to the first point in this cause, with respect to Mr. Denison's debt, and it is clear that the personal estate of Charles, the second intestate, is not liable; for he had no benefit from the sum raised, but borrowed it merely to pay off part of the former

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debt, and was compelled to take it, if at all, on such terms as the mortgagee would grant. In the second class of cases, the court will draw the inference, that the personal estate was intended primarily to bear the burden, from much slighter circumstances; and for an obvious reason. The intestate has purchased an estate subject to a mortgage; if he had purchased it freed from the mortgage, he would have paid the amount of the mortgage money in addition to the purchase money. To that extent, therefore, his personal estate may be said to have had the benefit of the mortgage money, and, consequently, in this class of cases, the court will, from slight circumstances, as \*an [\*622] alteration in the rate of interest, or in the terms of the mortgage, draw the inference, that the intestate intended his personal estate to bear the burden of the debt. But in the second case, as it occurs in this cause, with respect to the 4,112*l.* 10*s.* charged on the gavelkind lands by Charles, Earl of Thanet, it is clear that his personal estate is not primarily liable; for it is not pretended that he did anything which amounted to any of such circumstances; he entered into no covenant of any description, and never altered the nature or amount of the debt in any respect.

His HONOR said he should take time to read and consider the cases which had been referred to.

*July 26th.*—THE MASTER OF THE ROLLS:—If an estate descend to the heir, subject to a mortgage, and he becomes a party to an assignment of the mortgage, and, by bond or covenant, contract with the assignee to pay the amount due, he does not thereby make it his personal debt, as between his heir and executor. As between those parties, the mortgaged estate remains the primary fund for the payment of the mortgage debt; and the bond or covenant of the heir of the mortgagor is considered merely as an auxiliary security to the assignee.

The question in this case is, whether the indentures of the 22d and 23d days of June, 1827, with a bond and covenant from Charles, Earl of Thanet, as an auxiliary security, are to be regarded, to the extent of the 30,000*l.* advanced by Mr. Denison, as an assignment to that gentleman, of the mortgage originally given to Lord \*Petre. Lord Petre's mortgage [\*623] comprised the manor and lands of Silsden and other property in Yorkshire of considerable value. Mr. Denison prudently refused to advance the 30,000*l.* upon the security of lands charged with a prior incumbrance; and by the indentures, Lord Petre and the trustees of his marriage settlement, at the request and by the direction of Charles, Earl of Thanet, joined with him in the conveyance of the manor and lands of Silsden to Mr. Den-

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ison, in consideration of the sum of 30,000*l.* then, by the direction of Charles, Earl of Thanet, paid by Mr. Denison to Lord Petre; and there is a proviso for redemption from Mr. Denison by Charles, Earl of Thanet, of the manor and lands of Silsden, on payment of the sum of 30,000*l.*, on the 23d day of June, 1832, with interest at 5 per cent. The equity of redemption in the original mortgage to Lord Petre was on payment at the end of a year; and the interest reserved on that mortgage was 4 1-2 per cent.

It appears to me, therefore, that, in substance, this transaction was not an assignment, to the extent of 30,000*l.*, of an original mortgage, with an auxiliary security; but a release, by Lord Petre and his trustees, of the manor and lands of Silsden from the original mortgage, and a new mortgage of the manor and lands, by Charles, Earl of Thanet, to Mr. Denison, as a security for 30,000*l.*, at a new rate of interest, and with a new equity of redemption; and that the 30,000*l.* was thereby constituted the personal debt of Charles, Earl of Thanet, as between his heir and executor; and that his personal assets must be first applied in payment of the mortgage debt.

With respect to the purchase made by Charles, Earl of [\*624] Thanet, from the present earl, of his interest in the \*gavelkind lands, I concur entirely in the opinions expressed by Lord Alvanley and Sir William Grant, that the purchaser of an estate, subject to a mortgage, who has no contract or communication with the mortgagee, and who merely covenants with the vendor to pay the mortgage debt, does not thereby make the mortgage money his personal debt; and that his covenant is to be considered simply as an indemnity to the vendor, who has permitted the amount of the mortgage money to be deducted from the price.

The proportion of Lady Elizabeth Tufton's mortgage debt, which is to be attributed to the gavelkind lands, was, therefore, not the personal debt of Charles, Earl of Thanet; and, as between his heir and executor, the gavelkind lands remain primarily liable to the payment of that proportion.

## JOHNSON v. KENNETT.

1835: 23d and 24th January and 22d April.

Where an estate is charged generally with the payment of debts and legacies, and the debts have been paid, but not the legacies, the purchaser will not be bound to see to the application of the purchase money, unless it be proved that he knew of the payment of the debts; and the taking of a general bond of indemnity, or of a bond of indemnity against the legacies only, will not raise the inference that he knew of such payment.

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WILLIAM KENNETT, by his will, dated the 10th of December, 1808, gave an annuity of 50*l.* to his wife, and a legacy of 1,000*l.* to be paid to each of his three daughters, at the age of twenty-one years, or marriage: and subject thereto, and to the payment of his debts, he gave all his real and personal estate to his son, Thomas Kennett, his heirs, executors, administrators and assigns; and he appointed his said son executor of his will.

\*The testator died in May, 1809, leaving Thomas [\*625] Kennett, his only son and heir at law, his widow, and three daughters surviving him. Thomas Kennett proved the will, paid the testator's debts out of the personal estate, and entered into possession of the real estate of the testator.

In the year 1810, Thomas Kennett and his wife, by deeds of lease and release, and by fine, conveyed the real estates to uses to bar dower; and he afterwards sold those estates in lots to different purchasers, without having made any provision for the payment of the annuity to the widow, or of the legacies to the daughters of the testator. To some of the purchase deeds the widow was a party, and released her annuity. Bonds of indemnity were given by Thomas Kennett to all the purchasers: some of the bonds were conditioned for indemnifying the obligees against the legacies specially, and others were general bonds of indemnity.

In the year 1823, Thomas Kennett assigned all his real and personal estate to a trustee for his creditors.

The bill was filed by the testator's daughters against Thomas Kennett, the trustee for the creditors, the purchasers of the estates, and the widow; and it prayed that the will might be established, and that the purchasers might be decreed to contribute, in proportion to the amount of their respective purchases, towards the payment of the legacies, and the providing of a fund for the payment of the annuity; or that the real estates might be sold for those purposes.

The bill alleged, that Thomas Kennett paid the testator's debts out of the personal estate; but it contained no charge that the purchasers knew that the debts had \*been paid. [\*626] The purchasers, by their answer, said they could not set forth whether Thomas Kennett had or had not paid the testator's debts out of the personal estate; and they admitted that, at the time of their respective purchases, they had by the will, but not otherwise, notice, and that they believed that the annuity and legacies were well charged on the real estate, and that the same had not been, in any way, secured to be paid by Thomas Kennett; and they submitted that they were not bound to see to the application of their respective purchase moneys.

The case was heard before the Vice-Chancellor, who was of opinion that the form of the conveyances, and the bonds of in-

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demnity taken by the purchasers showed that they were dealing with Kennett, the devisee, as owner of the estates subject to the legacies; and that the purchasers were therefore bound to see the application of their respective purchase moneys. The case is fully reported by Mr. Simons, in the 6th volume of his Reports, p. 384.

The defendants, the purchasers, presented a petition of rehearing.

Mr. Preston and Mr. Wray for the appellants:—The general rule is well settled, that where there is a devise or trust for payment of debts generally, or for payment of debts and legacies generally, the purchaser is not bound to see to the application of the purchase money: *Williamson v. Ourtis*,<sup>(a)</sup> *Rogers v. Skillicorne*,<sup>(b)</sup> *Dolton v. Hewen*,<sup>(c)</sup> *Elliot v. Merriman*,<sup>(d)</sup> *Jenkins v. Hiles*.<sup>(e)</sup> General rules cease to be applicable in cases of fraud, and therefore an exception arises where there is collusion between the purchaser and the executor or trustee, or where the purchaser lends himself directly or indirectly to the commission of a fraud; *Hill v. Simpson*,<sup>(g)</sup> *Wilson v. Moore*.<sup>(h)</sup> There are no circumstances in the present case to deprive the purchasers of the benefit of the general rule. It is not pretended that there was any fraud or collusion between the executor and the purchasers; but it is said that Kennett and his wife levied a fine and conveyed the estate to uses to bar dower; that Kennett, therefore, assumed the character of owner; that the purchasers dealt with Kennett, not in his character of executor, but as owner of the estates, subject to the payment of the legacies; and that, having full notice that the estates were charged with legacies which remained unpaid, they took bonds of indemnity against the legacies. The decree directs an inquiry as to the debts, and therefore admits that debts may be still subsisting. The fine was levied, and the estate discharged of the wife's dower for the purpose of carrying the estates with greater facility into the market. The purchasers had a right to take an indemnity either general or special; and no fraud can be fairly imputed to them, or is indeed attempted to be charged against them, by the frame of the bill for having taken that precaution. The inference attempted to be drawn from the purchasers having taken bonds of indemnity against the legacies is, that they knew that the debts were paid; but there is no charge to that effect in the bill. It is alleged in the bill that Kennett possessed himself of the personal estate of the testator, and thereout paid the testator's fu-

(a) 3 Bro. C. C. 96.

(b) Ambl. 188.

(c) 6 Mad. 9.

(d) Barn. 78.

(e) 6 Ves. 654, n.

(g) 7 Ves. 152.

(h) 1 Mylne &amp; Keen, 126, 337.



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neral and testamentary expenses and debts; \*and the [\*628] purchasers, in their answer, say that they cannot set forth whether Kennett had or had not paid the testator's debts. It is stated, in the notice of this case given in the last edition of Sir Edward Sugden's Treatise on Vendors and Purchasers,<sup>(a)</sup> that the answer did not deny that the debts had been paid. That statement is true as far as it goes, but it does not entirely represent the effect of the answer. The answer neither denies nor admits that the debts had been paid, but it amounts to a clear denial of all knowledge as to the payment of the debts. [The LORD CHANCELLOR. Whether the debts were paid or not is immaterial for the purpose of affecting the purchasers, if they did not know it; and it is not charged in the bill that they knew it.] The case chiefly relied upon in the court below was *Watkins v. Cheek*,<sup>(b)</sup> but that was a case of fraud, and has, therefore, no application to the present case. If the rules affecting the liability of purchasers are carried further than they have been, the most mischievous consequences are likely to ensue. In *Balfour v. Wellard*,<sup>(c)</sup> Sir William Grant observes that the doctrine upon this subject has been carried farther than any sound equitable principle will warrant.

Mr. Willcock for a defendant in the same interest as the appellants.

Mr. Wigram and Mr. Roupell *contra*:—It is only where the charges upon real estate are of an indefinite nature, that the purchaser is not bound to see to the application of the purchase money; if the charges are specified, if they are ascertained or ascertainable, the purchaser buys at his peril. Where a testator, as in the present case, charges his debts and legacies upon \*his [\*629] real estate, and his debts are paid *aliunde*, and the circumstances of the transaction show that the purchaser knew of such payment, the case is reduced to one in which the legacies alone are charged upon the real estate, and the purchaser is bound to see to the payment of the legacies. The indefinite character of the charge is taken away by the nature of the transaction, and the definite charge remains. The purchasers dealt with Kennett, not as executor or trustee, but as owner; it is charged in the bill, and admitted by the answer, that the treaty for the purchase took place upon the representation that Kennett was the absolute owner, subject to the payment of the legacies; and the form of the conveyances is consistent with that representation. The answer admits that the personal estate was more than sufficient for the payment of the debts; and some of the bonds of indemnity

(a) Vol. II, p. 39, 9th edit.

(c) 16 Ves. 156.

(b) 2 Sim. & Stu. 190.

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were taken by the purchasers for the expressed purpose of protecting themselves against the remaining charge. With respect to the direction in the decree for an inquiry as to the debts, that is a mere form; it being the invariable rule of the court, where an account is directed, to include such an inquiry.

This case is not distinguishable from *Watkins v. Cheek*,<sup>(a)</sup> where it was held, that if a purchaser deals with a vendor, who is devisee and executor under a will charging the real estate with the payment of debts and legacies, and the intrinsic circumstances of the transaction show that the vendor does not intend to apply the purchase money in satisfaction of the charge, the purchaser is liable. The very fact of taking bonds of indemnity against the legacies shows that the purchasers were dealing [\*630] with the vendor, not in his character of \*executor, but as a person who treated the property as his own, and who intended, or might be expected, to apply the purchase money to his own benefit. The purchasers would have required no protection, if there had been subsisting debts, and the nature of the indemnity, which they did require and obtain, furnishes of itself irresistible evidence to show that they knew of the payment of the debts, and that they might themselves become liable for the remaining charge of the legacies.

Mr. Preston in reply.

*April 22d.*—THE LORD CHANCELLOR:<sup>(b)</sup>—In this case William Kennett, by his will, gave an annuity of 50*l.* a year to his wife, and a legacy of 1,000*l.* to each of his three daughters; and, after making other dispositions in his will, he charged his debts and legacies generally upon his real estate. He died in the year 1809. It appears that his debts were paid out of his personal estate. In the year 1810 the real estate was sold in different lots; and the question is, whether the real estate in the hands of the purchasers is liable to payment of the annuity to the widow, and of the legacies given to the daughters.

The general rule, as to which there is no dispute, is this:—Where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the purchase money. Where debts are charged generally, or where debts and legacies are charged generally, the purchasers of the real estate are not bound to see to the application of the purchase money. The real estate \*being, in this case, [\*631] charged generally with the payment of debts and legacies, would not, therefore, *prima facie*, in the hands of a purchaser, be liable to the payment of the legacies; but it is said that the debts having been paid, and paid out of the personal es-

(a) 2 Sim. & Stu. 199.

(b) Lord Lyndhurst.

1834.—Parrott v. Palmer.

tate, and nothing remaining but the legacies, the case falls within the general rule applicable to cases where legacies alone are charged upon the real estate.

I find no authority for such a proposition. The rule applies to the state of things at the death of the testator; and if the debts are afterwards paid, and the legacies alone are left as a charge, that circumstance does not vary the general rule.

In this case it does not appear when the debts were paid. I do not find it charged in the bill, that the debts were paid previously to the sale of the real estate. There is no charge in the bill that the purchasers knew that the debts had been paid; no allegation that can raise the question whether they had or had not notice of such payment. On the face of the bill, the case is the mere general case of real estate charged with the payment of debts and legacies. It is said, that from the nature of the transaction, the purchasers must have been aware that the debts were paid, because bonds of indemnity were taken by them against the legacies only, no mention being made of debts. But this is not correct as a general statement; for I have looked at the bonds, which were handed up to me, and it appears that some of them mention the legacies only, but some are mere general bonds of indemnity. I lay no stress, however, on that circumstance; for it does not appear to me, that if all the bonds of indemnity had been taken against the legacies \*only, that [\*632] would at all vary the case. It would have been quite idle to mention the debts in the bonds, because, if there were any debts, it was clear that the parties were indemnified.

I am of opinion, therefore, that the judgment of the Vice-Chancellor must be reversed.

#### PARROTT v. PALMER.

1834: 6th, 7th and 11th November.

Where the lord of a manor, who claims against the tenants the right of property in the mines within the manor, has stood by for a long period and allowed the tenants, without objection, to work the mines, and to expend large sums of money upon their mining operations, the court will not assist him by making a decree for an injunction or account against the tenants, but will leave him to his legal remedy.

Distinction between the cases in which the right to an account is incident to the injunction, and those in which it is independent of that relief.

Peculiarity of the case of mines in this respect.

The right to an account, even in the case of mines, may be lost by *laches*.

THE bill in this case was filed by the lord of a manor against certain of the tenants of lands within the manor, and also against the lessees under those tenants. It prayed an account of the quantity of coal, ironstone, and other minerals worked and raised

1834.—Parrott v. Palmer.

by the defendants, the tenants, or by other persons by their permission, out of the lands or mines lying within the manor, and of the profits derived therefrom; that the defendants might be decreed to pay the full value thereof to the plaintiff; and that they might be restrained by injunction from working such mines, and digging or removing such minerals in future.

The decree of the Master of the Rolls, made at the [\*633] hearing of the cause, directed that the bill should \*be retained for a year; that the plaintiff should be at liberty to bring an action of trover against the tenants, for the purpose of trying the right; and that the defendants in that action should admit, upon the trial, that they had, within a year, raised or procured coal, ironstone, or other minerals out of the lands in question.

The defendants, the tenants, appealed against the whole of his Honor's decree; but the other defendants, the lessees, did not appeal.

Sir W. Horne, Mr. Knight and Mr. Whitmarsh in support of the decree.

Sir E. Sudgen, Mr. Jacob and Mr. Richards for the appeal.

The Solicitor-General (Mr. Rolfe) and Mr. Preston appeared for the lessees.

The points upon which the appellants relied, were principally four: first, that the lands in question were not copyhold, but customary freehold, and that the law which gave the lord the right to the soil, and to whatever lay below the surface of the ground, in copyholds, did not extend to customary freeholds; secondly, that by the special custom of this particular manor, or by long and uninterrupted usage, the tenants were entitled to dig for and take the minerals; thirdly, that the plaintiff's remedy was exclusively at law; and fourthly, that at all events the plaintiff, by standing by for a long period, and permitting the defendants to expend large sums of money in the erection of buildings and machinery for working the mines, and by his subsequent *laches* in applying to the court, had precluded [\*634] himself from \*obtaining an injunction, and that his title to an account depended on his title to the injunction.

Upon the point of law raised by the first proposition, the following authorities were cited; *Bishop of Winchester v. Knight*, (a) *Doe v. Danvers*, (b) *Bourne v. Taylor*, (c) *Curtis v. Daniel*, (d) *Whitechurch v. Holworthy*. (e)

(a) 1 P. Wms. 406.

(b) 7 East, 299.

(c) 10 East, 189.

(d) 10 East, 273.

(e) 4 M. & Sel. 340.

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With respect to the second proposition, a voluminous body of evidence was adduced on both sides, the result of which is stated and summed up in the judgment. As to the evidence required to establish a custom in a manor, *Doe v. Mason*,<sup>(a)</sup> *Roe v. Jeffery*,<sup>(b)</sup> and *Doe v. Dauncey*,<sup>(c)</sup> were referred to.

Upon the questions as to the law and practice of the court, involved in the third and fourth points, reference was made to the following cases; *Sayer v. Pierce*,<sup>(d)</sup> *Jesus College v. Bloome*,<sup>(e)</sup> *Jefferys v. Smith*,<sup>(g)</sup> *Grey v. Duke of Northumberland*,<sup>(h)</sup> *Jones v. Jones*,<sup>(i)</sup> *Crow v. Tyrrell*,<sup>(k)</sup> *Bishop of St. Asaph v. Williams*,<sup>(l)</sup> *Dench v. Bampton*,<sup>(m)</sup> *Richards v. Noble*,<sup>(n)</sup> *Norway v. Rowe*,<sup>(o)</sup> *Cholmondeley v. Clinton*,<sup>(p)</sup> *Cuthbert v. Creasy*,<sup>(q)</sup> *East India Company v. Vincent*,<sup>(r)</sup> *Hanning v. Ferrers*.<sup>(s)</sup>

\*November 11th.—THE LORD CHANCELLOR:—The [\*635] questions in this case were raised by the plaintiff, who as lord of the manor of Oldbury Walloxall, otherwise Langley Walloxall, in the county of Warwick, filed his bill in the year 1824, against the defendants, some of whom are tenants of the manor, and others, lessees under those tenants, of the coal and ironstone mines appertaining to the customary tenements. The lord, denying that there was any custom which entitled the tenants to the minerals, prayed an injunction and account.

In the court below, both classes of defendants appeared and contested the point, but the tenants only have appealed; and it is admitted that they have themselves done no act with respect to the minerals beyond leasing them to, and receiving rent from those other defendants who have not appealed.

The defence set up by the answers was, that the tenants hold according to the custom of the manor, and not at the will of the lord; and that they have by the custom a right to dig and take the minerals; that this right has always been exercised by them, and those whose estates in the customary tenements they now have; and that, until the bill was filed, they were never forbidden or in any way interrupted in their operations, although these were sufficiently public and notorious; and they claimed not only to be exempt from the injunction, but also that no account should be decreed, or, if any, that it should not go back beyond the filing of the bill, or at all events not beyond the period of six years, to

(a) 3 Serjt. Wils. 63.

(b) 2 M. &amp; Sel. 92.

(c) 7 Taunt. 674.

(d) 1 Ves. sen. 232.

(e) 3 Atk. 262.

(g) 1 Jac. &amp; W. 298.

(h) 17 Ves. 281.

(i) 3 Mer. 161.

(k) 3 Mad. 179.

(l) Jac. 349.

(m) 4 Ves. 700.

(n) 3 Mer. 673.

(o) 19 Ves. 144.

(p) 1 Turn. &amp; Russ. 107; 4 Bligh, 1.

(q) 1 Bligh, 125, note.

(r) 2 Atk. 83.

(s) 1 Eq. Ca. Ab. 357.

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which the Statute of Limitations would confine all such claims at law.

[\*636] \*Issue being joined, witnesses were examined, and other evidence given; and, the cause having come on for hearing at the Rolls, in the month of November, 1832, his Honor was pleased, by his decree, to order that the bill be retained for twelve months, with liberty for the plaintiff to bring an action of trover against the defendants, the tenants of the manor, who were ordered to admit the taking, within a year past, of coal and ironstone from under their copyhold tenements.

From this decree, the other parts of which were merely formal and consequential, the present appeal is brought; and several important questions, as well of fact as of law, having been raised before me, I shall proceed first of all to state my opinion upon the former, because the conclusion at which I have arrived, respecting the facts, precludes the necessity of deciding some of the points of law made, and enables me to dispose of the others.

I entirely agree with his Honor that, generally speaking, a custom should not be tried here, but should go before a jury. The defence, however, resting in this case upon long use, which was uninterrupted, assumes another shape, and goes to the equity of granting either of the things prayed by the bill, namely, account and injunction, after one party has stood by for so long a period, and suffered the other to expend money and bestow labor upon the disputed operations. In this view it becomes absolutely necessary to examine the conduct of the parties, with a wholly different object from that of proving or disproving the custom which the defendants set up, and which the plaintiff by anticipation traverses; although much of the evidence may be of a kind which makes it common to both questions, and subservient to the purposes of each. It thus happens that I shall

[\*637] \*inquire concerning the acts of the customary tenants, without at all disposing of, or indeed touching, the issue with respect to the disputed custom.

A considerable portion of evidence has been given by the defendants, as to the digging of clay and cutting of trees, which I do not think at all decisive of any question touching the mines of coal and iron; though certainly it is not unimportant even with reference to that question, because it shows a constant practice of dealing with timber and subsoil, things generally in the lord. For thirty or forty years past, and according to one witness, for fifty or sixty, clay is shown to have been dug by various tenants of the manor, for the purpose of openly making bricks at kilns within the manor, but which were sold out of the manor. Timber trees, in considerable number and of some value, were cut;—in one place 120, the finest in the county;

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and these were sawed into planks for the use of the collieries that were worked by the tenants.

The coal workings however form a far more important consideration. It is satisfactorily proved that Messrs. Parker & Co., worked coal and iron mines for thirty years, and Messrs. Wright and Danks, for forty years, in the Oldbury field; and that their operations were carried on openly, five or six boats in a day being loaded on the canal with the coal got. These workings are proved, I think, by six witnesses of various descriptions and ages, including one who, previously to the year 1820, had been steward of the manor. Their testimony shows that the mining operations were carried on in the face of day, only 300 yards from the house where the manor courts were holden, and close by a turnpike road; that two persons called benchers, and employed to value for the lord, lived on the spot, the one for ten, the other for twenty years; and that the lord's [\*638] bailiff lived there for ten years. The steward himself states that the lord and lady of the manor knew of the tenants taking the minerals, and yet never gave any directions to obstruct, or even to prohibit or warn them against doing so. He also says that he knows that the customary tenements were sold so much the dearer on account of the mines supposed to be under them and accessible to the tenants, and that the minerals were worked openly, and for sale, by those to whom the tenants demised them.

Some evidence is also produced from the records of the manor court. A tenant, in the year 1809, devised his tenement to trustees in trust, to sell the coal and ironstone under it, which they did for the sum of 600*l.*, so late, however, as the year 1820. The purchaser was not admitted as tenant in respect of those minerals; but it is certain that the steward was cognisant of the will and the sale, by the enrolment of the former. This transaction, which, had it happened earlier would have been very important, took place only four years before the suit commenced. Its materiality is lessened by this circumstance; nevertheless it throws no light burden of explanation upon the plaintiff, who lay by for four years after so important an assertion of adverse right.

But another fact exists in the cause, and of a much earlier date. One tenement is conveyed by surrender, and the surrenderee is admitted on the Court Rolls, on the 25th of October, 1803, with an express reservation, on the part of the tenant, of "the mine or mines of coal or ironstone that may be under the same." Several other surrenders of the same tenements, in like manner and with the like reservation, appear entered on the Court Rolls, from that time down to the 5th of \*April, [\*639] 1814. The steward, then by the most authentic evi-

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dence, that of the Court Rolls, and, therefore, the lord also whom he represents, is thus fixed with knowledge of the fact, that one tenant of his manor had been asserting his right to the minerals, and dealing with them as his property for above twenty years, and another for above four years, prior to any steps being taken against any of the tenants, and without any assertion, on the lord's part, of a right, or any preferring of a claim at all inconsistent with the pretensions of the copyholders. It is lastly in evidence, that upwards of 85,000*l.* have been expended in the working and machinery of these mines, in the long period of considerably more than thirty years, during which the defendants or their leasees worked these mines; and that the lord and his agents saw them work the mines without offering any opposition, giving any warning, or pretending any title to dispute rights so asserted and so acted upon for a course of so many years and in the face of day.

The first conclusion which I build upon these facts, admits of no doubt at all. This is a case which will not allow the mention of injunction. Not that by the nature of the question that relief is excluded: for the case of *Dench v. Bampton*, before Lord Loughborough,<sup>(a)</sup> is clearly not law; and independently of its having been overruled a few years afterwards, in the case of *Richards v. Noble*,<sup>(b)</sup> the principle on which Lord Loughborough proceeded has never been considered a sound one, namely, that the only remedy of the lord for waste done by the tenant in cutting timber without license or custom, is at law, for the forfeiture, a doctrine laid down by his Lordship in a case of timber, but which he clearly applied to mining and all other waste \*as well. I am clearly of opinion, therefore, that there is nothing in the nature of the case to exclude the relief, by way of injunction, for which this bill prays.

But I am equally clear that the party complaining has, in this particular instance, by his own conduct, disentitled himself to that relief. If there be anything well established in this court, it is that a man who lies by, while he sees another person expend his capital and bestow his labor upon any work, without giving to that person notice, or attempting to interrupt him—one who thus acquiesces in proceedings inconsistent with his own claims—when he comes to enforce those claims in this court, shall in vain ask for its interposition by an injunction, of which the effect would be to render all the expenses useless, which he voluntarily suffered to be incurred. Here more years have been allowed to elapse than the number of weeks which would have closed the doors against the plaintiff coming to seek an injunction.

In the next place, I think I have disposed by the preceding

(a) 4 Ves. 700.

(b) 3 Mer. 673.



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remarks of an argument, much relied upon by the defendants, that there can be no account now, because there can be no injunction. Whether the former of these species of relief can be granted, where the latter is not competent, is a question which has been oftentimes agitated, and has, perhaps, never received a clear and a general decision; that is to say, a distinct judgment on the general proposition, with its limitations. But it may be laid down generally, that unless in the case of mines, the rule is—no injunction, no account. In *Jesus College v. Bloome*,<sup>(a)</sup> where an account was prayed of timber cut by a tenant before the \*assignment of his lease, and the term being gone, [\*641] no injunction could be had, the court held that no account lay, and so it was decided, though the court said *obiter* that mines formed an excepted case, being in the nature of a trade or business. In *Whitfield v. Bewit*,<sup>(b)</sup> where an account of timber cut, and an injunction against opening mines, were prayed, the court appears to have given the account only as incident to a discovery. Indeed in *Sayer v. Pierce*<sup>(c)</sup> which was a case of mines, but where no possession had been shown by the plaintiff, Lord Hardwicke would only entertain the suit in respect of the confusion of boundaries, and he retained the cause for a year with liberty to bring ejectment. In *Garth v. Cotton*,<sup>(d)</sup> Lord Hardwicke takes a somewhat different view of his own judgment in *Jesus College v. Bloome* from that which the report of the case gives: but he does not overthrow its doctrine; for he takes the broad distinction, that in the one case there was a legal remedy, and in the other, no remedy at all. But it is certain that if *Lee v. Alston* be law, the distinction formerly taken, particularly in *Jesus College v. Bloome*, is shaken, if not overthrown, and a principle established, that wherever timber is cut on the estate by one not having right, account will lie, because, to use Lord Thurlow's expression, the wrongdoer may be treated as a bailiff. And yet, Lord Thurlow assumes throughout that there is all the while a remedy at law. It must, however, greatly detract from the weight of a doctrine so decidedly opposed to the distinct and sensible opinion of Lord Hardwicke in *Jesus College v. Bloome*, that neither in the two reports of Lord Thurlow's judgment, when the cause was last before the court,<sup>(e)</sup> nor in the year \*1779,<sup>(g)</sup> when it was formerly heard, is there the least [\*642] mention made of that celebrated case, nor indeed of *Sayer v. Pierce*.

From the whole it may be collected that although, as to tim-

(a) 3 Atk. 262.

(b) 2 P. Wms. 240.

(d) 1 Ves. sen. 524; and more fully in 1 Dick. 183.

(e) 3 Bro. C. C. 38; and 1 Ves. jun. 78.

(g) 1 Bro. C. C. 194.

(c) 1 Ves. sen. 232.

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ber, there exists considerable discrepancy, yet the sound rule is to make account the incident and not the principal, where there is a remedy at law; (a) but that mines are to be otherwise considered, and that, as to them, the party may have an account even in cases where no injunction would lie.

I must now proceed to observe, however, that, even if it had been otherwise, even if the rule had been that there could be no account of mines in a case where no injunction lay, the rule would have had no application to the present case. That rule is, not that in any particular instance where, from accidental circumstances, the party fails in obtaining an injunction, he cannot have account; it only is that where, from the nature of the question, injunction is not competent and could not be prayed, as where the waste has been committed by a former tenant, and his lease is out, or his term assigned, and consequently there is nothing to restrain, no account will lie.

There is no such incompetence, however, in the case at bar. The present defendants being still in possession of their copyholds, may go on working, or may open new mines, and, consequently, in the nature of the case, injunction is possible. It is, indeed, prayed for. This distinction is plainly taken by Lord Hardwicke in *Smith v. Cooke*, (b) where he says, "and though [\*648] \*the plaintiffs have not actually moved for an injunction, they might reserve their relief till the hearing of the cause, if they thought proper; and I am of opinion it is incident to their estate, and they are entitled to an account for such waste." So the learned counsel in *Richards v. Noble*, (c) whose admission was relied upon in the argument here, concede only that, without the prayer for an injunction, the plaintiff could have no account. In the present case there is the prayer; and the relief of injunction, as I have already shown, is not excluded by anything in the nature of the case. It is only that the *laches* of the plaintiff happens to have made it hopeless for him to move, and he has as yet not moved, for that relief, and in all likelihood never will.

It is then to be considered whether or not the same *laches* does not disentitle him to an account; and I am of opinion that it does. Shall a party stand by and see others laying out their money for thirty or forty years upon works, without giving them any warning at all—see all this and say nothing—look on and "make no sign," while perhaps the trade is a doubtful or losing concern; and then, when the speculation has proved successful, come for an account, that is, a share of the profits? By no means. Had no ore been got, had the coals found no vent, had the smelting-house which the plaintiff suffered to be erected,

(a) See *Baily v. Taylor*, 1 Russ. & Mylne, 73.

(b) 3 Atk. 378.

(c) 3 Mer. 673.

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blazed in vain, and the machinery which he let his tenants erect with the finest timber trees in the county, growing on the copyhold tenements, failed to drain the field of coal, and to raise a saleable commodity, he never would have asked for an account—he never would have asked that the loss upon the concern might be shared between him and the \*under- [\*644] takers. And shall he now be suffered to come into this court, and going back long before his suit gave the first intimation of his claim, the first warning of the tenant's danger, invoke the aid of the court in order to have the profits refunded? He shall not. The remedy in courts of law is open to him, and there, as the mere right alone comes in question, subject to the statutory period of limitation, he may obtain satisfaction from whatever wrongdoer has assailed his rights.

I reserve for a subsequent head of argument the decisive authorities, all pointing the same way, of the cases, both at law and in equity, upon lapse of time.

The next inference which I deduce from the facts, and from the law of the case, is, that no account can be had prior to the filing of the bill at the earliest. To determine, however, whether the bill shall be entertained at all, and an account given even to that extent, we must look at the facts. If given against any one, it should rather be against the defendants who do not appeal, and against whom the decree makes no order, than against the appellants, who are shown not to have taken any of the ore or coals. The law is clearly open to the plaintiff against them; and the decree only enables him to proceed against the appellants at law, by ordering them to admit a taking which is directly contrary to the fact.

I do not see what occasion there was to come into equity in this case,—none certainly as against the defendants who do not appeal, and who are the parties that have actually worked the mines; for against them trover lay, without the aid of this court. As for the others, it is to be observed, that if no action will lie at law for money had and received by them to the plaintiff's use, \*in respect of the rent which they have [\*645] received from their lessees of the minerals, there cannot be a stronger reason for holding that, in the nature of the case, a bill here does not lie for the same receipt; and we are never to forget what applies to the case of both classes of defendants, that in *Sayer v. Pierce* Lord Hardwicke clearly held that he could not interfere, even in the case of mines, where no possession by the lord had been shown.

The cases at law, especially *Curtis v. Daniel*, (a) mainly favor this doctrine. It was there held that trover would not lie for

(a) 10 East, 273.

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ores dug by the customary tenants under their tenements, after twenty years' possession, by acts of ownership on their part, and none such within that time on the part of the lord. But, indeed, the doctrines laid down both by the Master of the Rolls, and by Lords Eldon and Redesdale in the Court of Appeal, in *Cholmondeley v. Clinton*,<sup>(a)</sup> and on which the decision of that celebrated case turned, go the full length of the same conclusion in respect of title to equitable relief; and the case of *Cuthbert v. Creasy*,<sup>(b)</sup> of which a very full and apparently accurate report, though with a judicious abridgment of the argument, is to be found in the fourth volume of Mr. Bligh's reports, is directly in point, having also been decided by Lord Eldon, after very great consideration, and professedly upon the authority of *Cholmondeley v. Clinton*. That was the case of a bill of discovery, in aid of an action of intrusion brought by a remainder-man, after the tenant for life had been dead thirty-nine years, and the plaintiff had been of age twenty-seven years: the bill was against churchwardens and overseers, who had taken possession and had enjoyed a [\*646] continuing, though, as \*was alleged, an intrusive possession; and there a lapse of more than twenty years was held fatal to the demand made of the equitable relief. The same circumstances, therefore, existed there, as here, of continued acts—acts within twenty, or within six years, and no serious doubt prevented the application of the principle.

I am of opinion, therefore, that as against the defendants, the appellants, the bill should have been dismissed with costs. But I am inclined to think that regard being had to the time which has elapsed since the filing of the bill, I ought, in dismissing it, to place myself in his Honor's shoes, and do as he ought perhaps, to have done, as to the other defendants who have not appealed. I mean that on this I shall take further time to consider whether the suit should be dismissed, but with leave to bring trover; and that the defendants should be restrained from setting up the Statute of Limitations, as to anything done since the filing of the bill.

In thus disposing of the cause I feel very easy as to the question, whether anything is excluded which could have advantaged the plaintiff, had the decree stood, and the action of trover been tried. Even with the somewhat extraordinary admissions imposed upon the appealing defendants, I feel that no jury would ever have found for him, in the face of such evidence of *laches*, indeed of acquiescence, as this case abounds with; and I am persuaded, that the end now made of the case, (for I hardly expect any action to be tried against the other defendants,) will only

(a) 4 Bligh, 1.

(b) 4 Bligh, 125, nota.

prevent a delay of final settlement and peace between the parties, and preclude a very fruitless renewal of litigation in both courts.

**\*THE ATTORNEY-GENERAL v. THE MAYOR, ALDERMEN [\*647]  
AND BURGESSES OF THE BOROUGH OF NEWBURY.**

1834: 5th and 27th March.

Principles upon which the account is to be taken against corporations, who are trustees of charities, and have misapplied the funds.

THIS was an information praying that an account might be taken of the rents and profits of the estates devised to the defendants, the corporation of Newbury, by the will of one John Kendrick, upon certain charitable trusts; and that a scheme might be settled for the future administration of the charity.

The Vice-Chancellor's decree having, among other things, directed the Master to take an account of the rents and profits which had come to the hands of the defendants since the 24th of June, 1825, the informant appealed against that part of the decree.

In assuming the 24th of June, 1825, as the point from which the account should commence, his Honor had followed the analogy furnished by a decree made by the Lord Chancellor, upon another charity information, in which the same corporation were the defendants, and which was filed for the purpose of having the accounts taken of certain estates, belonging to a charity known by the name of Cowslade's charity. The decree of Sir John Leach in that suit, which had not given the account beyond the time of filing the information, was so far varied by the Lord Chancellor on appeal, that the Master was directed to carry back the account to the 24th of June, 1825, that being the date of the last appointment of trustees, nominated by the corporation to administer the charity.

\*The petition of appeal submitted, that as there had [\*648] not been (as in the case of Cowslade's charity) any distinct appointment of trustees for the management of Kendrick's charity, which had continued, from its earliest institution, to be a trust vested in the corporation at large, who had mixed the funds belonging to that charity with their other corporate funds, the decree made with respect to Cowslade's charity had no bearing on the present case; and that the account ought to have been carried back to the date of the foundation.

The leading facts of the case as well as the different topics of argument urged, and the authorities cited in support of the appeal, are stated and considered in the judgment.

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1834.—*The Attorney-General v. The Mayor of Newbury.*


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Sir *W. Horne* and Mr. *O. Anderdon* for the appeal.

Sir *E. Sugden contra.*

*March 27th.*—THE LORD CHANCELLOR:—John Kendrick by his will, dated the 29th of December, 1624, after bequeathing certain sums to the corporation of Reading, bequeathed 4,000*l.* to the corporation of Newbury, upon trust to buy therewith a commodious house within the said town, to set the poor on work, and with the residue to make a common stock for the employment of the poor in such house, according to the discretion of the corporation, and the trusts he had before declared of his bequest to the corporation of Reading.

The corporation of Newbury having obtained the usual license, in the 2d of Charles I, they purchased, on the [\*649] \*8th of June, 1626, the tenement in Newbury, called The Castle, and a small plot of land, for 350*l.* On the 26th of February, 1638, a small estate called the Wash was conveyed to them in consideration of the sum of 241*l.* To this purchase they afterwards added another, of a lease from the chapter of Windsor, of a meadow called Nepitts, for a term of twenty-one years; and they also built a workhouse.

In the month of June, 1677, a resolution was entered into by the corporation, that the money bequeathed by John Kendrick should be employed according to the trusts of his will, and that, in the absence of any particular direction, it should be employed for the benefit of the poor inhabitants of Newbury, in such manner as the deputy steward should advise, with safety to the corporation.

At another meeting, holden on the 1st of February, 1706, it was resolved to establish a charity school, with the said funds, the master of which was to receive 30*l.* per annum; and certain trustees were to be appointed for the due management thereof.

This school was kept up for many years; but after the establishment of a national school at Newbury, the boys were, in the year 1827, removed thither, and the sum of 20*l.* per annum was paid to the master for their instruction. In the year 1829 the number of boys was nineteen.

In the year 1793 the corporation demised part of the lands purchased under the trust, together with other lands, to the undertakers of the Kennett navigation for twenty-nine years, and upon the expiration of the lease, received a sum of 1,789*l.* for dilapidations. The trust estates now yield an income of 310*l.* per annum.

[\*650] \*There are also two small bequests by Nicholas Clement and Thomas Stockwell towards the support of the same school.

This information was filed in Hilary Term, 1830, for an account and a scheme.

An information had been filed in Trinity Term, 1829, against the same corporation, with the view of obtaining the like relief against them, with respect to a charitable bequest made by Richard and Thomas Cowslade, deceased. Upon the answer to that information coming in, the relators finding that some of the grievances complained of formed the subject matter of both suits, owing to the mode in which the corporation accounts had been kept, amended the present information, and made Mr. Hazell, the chamberlain, and Mr. Baker, the town clerk, parties.

The Vice-Chancellor dismissed the information against two of the defendants, Hazell and Baker, and ordered their costs to be paid out of the charity funds, without prejudice to the question by whom they should be eventually paid; and he directed an account to be taken from the 24th of June, 1825.

It is unquestionable that where trustees of a charity have, through real mistake, and without any corrupt motive, misapplied the funds under their care, their conduct will be considered with a lenient disposition, if not in a favorable light; and that they will not be visited as if they had knowingly and wilfully diverted the fund from its proper uses. This has been often laid down in the cases before the court; and it is distinctly, and more than once, stated in *The Attorney-General v. Corporation of Exeter*.<sup>(a)</sup> The circumstance of the trustees being a corporate body, should certainly rather increase the disposition towards a lenient construction of their proceedings; and, although in contemplation of law, the identity of the body is preserved through ages, yet, misdeeds alleged to have been committed long ago are only to be visited upon those of the present generation, when there exists no doubt of the misfeasance. In point of law, the body is precisely one and the same; but no strictness of legal principle can prevent us from, at least, exacting very clear proof of a case, when, in point of fact parties between whom there subsists but a slender kind of privity, are made answerable for each other's acts.

On the other hand, we must be careful not to admit any relaxation of principle which would open the door to boundless abuse, and especially in bodies, from their very nature so prone to all kinds of negligence and misconduct. Such a door would assuredly be flung open, were the court to hold that nothing short of corruption could fix a corporation with the consequences of acts done in old time. It is a misfeasance, and a serious one, for any trustees, be they individuals or corporate bodies, be they corporations aggregate or sole, who are entrusted with different funds,

(a) 2 Russ. 45.

to mix them together, and thus divert into one channel the bounty which was destined to flow in another. The founder of a charity has an unquestionable right not only to direct that his funds shall be applied to the particular purpose which he has selected and declared, but to prohibit, by that specification, their application to any other purposes: and the case may easily be figured of a founder being more averse to the one application, than he is favorable to the other,—of a person placing a [\*652] fund in the hands of \*trustees who have, or may afterwards obtain, the management also of other funds destined to objects most hateful in the eyes of the first donor; objects, rather than further which, he would greatly prefer throwing his property into the sea. If the trustees, in such a case, were to mix the funds together, no goodness of intention, supposing them to be cognizant of the confusion they were effecting, could excuse them; and the expenditure of the whole property on public purposes, though it might relieve them from moral imputation, could not exculpate them in the eye of the law, from the charge of abusing their trust.

In the present case, a sum of 4,000*l.*,—a sum considerable at any time, and large in the early part of the 17th century,—was left to the corporation of Newbury, to be employed in purchasing commodious premises, wherein the poor might be set to work, according to the discretion of the corporation. The court is not here called upon to say what might have been the consequence, had the corporation neither purchased premises, nor set the poor to work, with the fund, but used it in some other manner, though for public purposes; because a purchase was made soon after the decease of the testator, and with so large a portion of the fund that the yearly value now amounts to a considerable sum, and accommodation for the poor, and the means of setting them to work were provided.

That the whole of the yearly income of the residue over the purchase money may not have been employed strictly according to the provisions of the will, is very likely. But this seems to be no case for so extraordinary and so severe a proceeding as carrying back the account to the date of the bequest, or even for any great number of years, as we might be entitled to do were it [\*653] clearly \*shown at what time plain misappropriation had commenced, without an excuse of misapprehension, or of failure of objects. Neither do I consider that we are entitled merely to state the fact of the fund having been blended with other charitable estates in the keeping of the same trustees, and then to call on the corporation to show when they began to mix the different funds, and go back either to the foundation of the charity, or to some intermediate and arbitrarily assumed point of time, in default of the corporation specifying the era when blend-



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ing or other misapplication commenced. The cases that have been referred to, of *The Attorney-General v. The Brewers' Company*,<sup>(a)</sup> *The Attorney-General v. Mayor of Exeter*,<sup>(b)</sup> *The Attorney-General v. The Corporation of Stafford*,<sup>(c)</sup> *The Attorney-General v. Dixie*,<sup>(d)</sup> and *The Attorney-General v. Corporation of Newbury*,<sup>(e)</sup> decided by me in 1831, with respect to the other charity of which these defendants were trustees, do not, I apprehend, warrant any such doctrine.

Upon the whole circumstances of the case, which I have taken time to weigh, and with some jealousy excited towards the conduct of the corporation in confounding together funds which they certainly ought, on every account, to have kept apart, and having regard especially to the period to which the decree in the latter case carried back the account to Cowslade's charity, I have arrived at the same conclusion to which his Honor came, and I think the account should go no further back than the month of June, 1825.

Having stated that there are circumstances of extenuation in the case of corporations acting *bona fide*, \*and [\*654] under honest mistake, or in the difficulty of finding objects, it may be added that no such alleviating topic can ever be allowed to enter into the consideration of the court, in cases where plain neglect, much more, wilful breach of trust, has been committed. The corporation is answerable as such, and the identity of the body, preserved through ages, makes it answerable, at any given time when the malversations are inquired of, for the proceedings which may have been had at a distant period.

It is of no consequence that the individuals now sustaining the corporate character, enjoying the immunities, and exercising the functions of the corporation, are wholly different from those who did the wrong, or who permitted the neglect, and are only connected with them through the medium of a common municipal character. This is the condition inseparably annexed to their corporate character; and the individuality of the body politic, with all its incidents, is thus maintained as perfectly in the system of jurisprudence, as the identity of the natural body is preserved entire in the system of the world. All who become corporators are, or should be, aware of the duties which they undertake, and the liabilities under which they come, or rather of the liabilities in the corporation to the management of whose affairs they voluntarily succeed. As individuals they never can be made responsible for what others have done or omitted to do; but in their hands, and under their administration, the abuses of former corporators, that is of the same corporation in former

(a) 1 Mer. 495.

(c) 1 Russ. 547.

(b) Jac. 443.

(d) 13 Ves. 512.

(e) 9th May, 1831, stated, p. 647, *supra*.

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times, may fall upon the corporate property. As far, too, as regards the character of existing individuals, no blame is imputable to them for the offences or the negligence of their predecessors.

But even all suspicion will be wiped away from them, [\*655] and they will entitle themselves to \*public praise and to public gratitude, in proportion as they show their readiness to investigate and correct the abuses of former times, to restore to their proper uses whatever funds may have been diverted, to eradicate imperfections which may have grown up, and to secure, by an exact and faithful administration of the trust reposed in them, those advantages to the rights and the comforts of their fellow citizens, which were the objects of all such foundations.

Decree affirmed.(a)

(a) See *The Attorney-General v. The Bailiffs of East Retford*, 2 Mylne & Keen, 35.

#### PARROTT v. SWEETLAND.

ROLLS.—1834: 7th July. Before the LORDS COMMISSIONERS.—1835: 8th and 29th June.

A vendor, in lieu of the price of 3,000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of her intended husband and herself, in case the purchaser should so long live, the purchaser engaging that his personal representative should, within three months after his decease, in certain events, but not in all events, pay a further sum of 3,000*l.* This is not a security, but a substitution for the price; and the lien of the vendor on the land is discharged.

THIS was a bill filed by the vendor of an estate and premises in the county of Devon, praying the specific performance of his contract by the purchaser.

It appeared from the abstract of title delivered to the solicitor for the purchaser, that, in the month of May, 1831, the premises in question were subject to a mortgage in fee to a person of the name of Kingwell; and that the plaintiff, Jasper Parrott, was entitled to the equity of redemption of the premises, for his life, with remainder to Sophia Parrott, his eldest daughter, and her heirs.

[\*656] \*By indentures of lease and release, dated respectively the 4th and 5th of May, 1831, and made between Sophia Parrott of the one part, and Jasper Parrott of the other part, after reciting that Sophia Parrott, for the considerations thereafter mentioned, was desirous of conveying and assuring unto Jasper Parrott, his heirs and assigns, her remainder in fee simple of and in the hereditaments, subject to the mortgage, and also of assigning unto Jasper Parrott the surplus of any purchase money to arise from the sale of the hereditaments and premises, in case Kingwell, his heirs or assigns, should thereafter make sale of the

same, he, Jasper Parrott, entering into the covenant thereafter contained for indemnifying Sophia Parrott, her heirs, executors, administrators and assigns, from all liability to pay the mortgage money and interest, and all other her and their liability whatsoever under the covenants in the indenture of mortgage; it was witnessed, that in consideration of the premises, and particularly of the covenant, on the part of Jasper Parrott, therein contained, for indemnifying Sophia Parrott in the manner therein expressed; for and also in consideration of the sum of 3,000*l.*, advanced, or agreed to be advanced or secured to Sophia Parrott, in contemplation of her intended marriage with Richard Languet Orlebar, by Jasper Parrott to Sophia Parrott, or Richard L. Orlebar, upon the terms expressed in a bond bearing even date therewith, she, Sophia Parrott, granted, bargained, sold, released and confirmed unto Jasper Parrott and his heirs, all that her remainder, expectant on the decease of Jasper Parrott, of and in the premises; to hold subject to the said life estate, and the said mortgage, unto Jasper Parrott, his heirs and assigns forever. And it was thereby further witnessed, that for the considerations thereinbefore expressed, she, Sophia Parrott, assigned unto Jasper Parrott all her interest in the moneys which \*might arise [\*657] from the sale of the premises comprised in the mortgage. And it was further witnessed that, in consideration of such conveyance and assignment, and in pursuance and performance of the agreement of Jasper Parrott in that behalf, he, Jasper Parrott, covenanted with Sophia Parrott, that he should and would take upon himself, and pay and satisfy the whole of the principal money and interest due on the mortgage.

On the indenture of release was indorsed a receipt, signed by Sophia Parrott, in the following words: "Received on the day and year first within written, of and from the within named Jasper Parrott, a bond for the sum of 3,000*l.*, being the full consideration within expressed to be given by him."

The bond referred to in the receipt, was a bond under the hand and seal of Jasper Parrott, of even date with the release, and was for payment of the penal sum of 6,000*l.* to Richard L. Orlebar. This instrument recited the intended marriage, and that, by the settlement made in contemplation of such marriage, an allowance for pin money, and a jointure, had, in the events therein mentioned, been settled for the benefit of Sophia Parrott; and that, on the treaty for such marriage, it was also agreed that, if the marriage should take effect, he, Jasper Parrott, should, during the life of the survivor of himself and his wife, pay to R. L. Orlebar, or to Sophia, his intended wife, in the event of her surviving him, the sum of 100*l.* per annum by half-yearly payments, if required; and also, that his executors and administrators should, in the event of there being any child or children of R. L. Orlebar,

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by his intended wife, living at the time of the decease of the survivor of them, Jasper Parrott and Sophia, his wife, unto R. L.

Orlebar, and in case of his decease before any child was [\*658] born, \*and such child should be born alive, but not

otherwise, in due time after his decease, to Sophia, his intended wife, and in case of the deaths of R. L. Orlebar and Sophia, his intended wife, to the child or children, if any, of the intended marriage, the sum of 3,000*l.* The condition of the bond was, that, if the marriage should take effect, and J. Parrott, his executors or administrators, should pay or cause to be paid unto R. L. Orlebar, or his assigns, the sum of 100*l.* per annum during his life, and, in case of his death, to Sophia, his intended wife, the like sum of 100*l.* per annum during her life (which said annual sums should be paid by half-yearly payments if required;) and also, if the executors or administrators of J. Parrott should pay, or cause to be paid within three months from the time of the decease of the survivor of them, J. Parrott, and his wife, the sum of 3,000*l.* unto R. L. Orlebar, if living, and there should be issue at that time by such intended marriage, but in case R. L. Orlebar should die in the lifetime of the survivor of J. Parrott and his wife, leaving issue of the intended marriage, or born alive within due time after his death, then, if the executors or administrators of J. Parrott should pay the said sum of 3,000*l.* unto Sophia, the intended wife of R. L. Orlebar, and in case of the death of R. L. Orlebar, as well as Sophia, his intended wife, in the lifetime of the survivor of J. Parrott and his wife, then, if the said sum of 3,000*l.* was paid unto the child or children, if any, of the intended marriage, within three months from the death of the survivor of them, J. Parrot and his wife, the obligation was to be void. And it was also to be void, so far as regarded the payment of the said sum of 3,000*l.*, in case J. Parrott should, by any deed, or by his last will and testament, or by any codicil thereto, give or bequeath unto R. L. Orlebar, in case he

should be living at the time of the death of such survivor, but if he should be \*then dead, to Sophia, his intended wife, any freehold or personal property or effects to the amount of 3,000*l.*, exclusive of any provision to which Sophia, the intended wife, or any child or children of her, might become entitled under the settlement made on the marriage between J. Parrott and his wife, or any power therein contained; otherwise it was to remain in full force and virtue.

The marriage between R. L. Orlebar and Sophia Parrott was solemnized immediately after the execution of these instruments.

The defendant, by his answer, insisted that the parties interested in the sum of 3,000*l.*, mentioned in the release and bond, had a lien in respect of that sum on the premises contracted to be

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sold; but he admitted that all other objections to the title had been waived.

Mr. *Pemberton*, Mr. *Preston* and Mr. *Bacon*, for the plaintiff, contended that the vendor's lien was an equity which prevailed only as between vendor and vendee, and could not be extended so as to operate for, or against a stranger to the transaction. It was an equity founded on the presumed intention of the contracting parties. Where, therefore, the case presented circumstances which negatived the presumption, the equity did not arise. The form of the receipt which was indorsed on the conveyance, and by which the vendor distinctly acknowledged that she had received all she contracted for, as well as the proviso at the end of the condition in the bond, by which it was declared that the obligation was to be void, so far as regarded the 3,000*l.*, in case the purchaser should give to the vendor, by deed or will, property of equal value, plainly showed that the bond was to be her only security, and was \*utterly irreconcilable with the idea of any lien being retained; *Winter v. Lord Anson*, (a) *Mackreth v. Symmons*, (b) *Clarke v. Royle*, (c) the last of which cases was not to be distinguished from the present case.

Mr. *Bickersteth* and Mr. *Shapter* for the defendant:—The general proposition may be safely conceded, that in cases of this kind, the question is always one of intention; for there is nothing in the circumstance of this transaction, and nothing in the language of the different instruments by which it was carried into effect, to justify the inference that the bond given by the purchaser here was in the nature of satisfaction, and not merely of security, to the vendor. The deed expressly recites the covenant for indemnifying the vendor against her liability in respect of the mortgage, and also the sum of 3,000*l.*, advanced or agreed to be advanced or secured to her in contemplation of her marriage, upon the terms expressed in the bond, as being substantive parts of the consideration; and the bond, when its language is examined, will be found to be framed simply with a view to secure, and as a means of securing, the due payment by the purchaser of the different items constituting the entire consideration, as the contingencies from time to time arose, upon which they became severally payable. The bond itself is not, and does not purport to be, the price paid as the consideration for the contract, but simply a security for the payment of the annuity and of the gross sum which were the real consideration; and the receipt, as its words import, is nothing more than an acknowledgment that

(a) 1 Sim. &amp; Stu. 434.

(b) 15 Ves. 329.

(c) 3 Sim. 499.

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the bond had been duly given. It has never yet been decided that the vendor's lien does not extend to third parties; [\*661] and no reason founded on \*principle can be suggested why it should not; *Mackreth v. Symmons*,<sup>(a)</sup> *Selby v. Selby*.<sup>(b)</sup> When *Clarke v. Royle*,<sup>(c)</sup> was decided by the Vice-Chancellor, his Honor proceeded expressly on the authority of the original decision in *Winter v. Lord Anson*,<sup>(d)</sup> not being aware at the time (for the case had not then been reported on the appeal) that Lord Lyndhurst had in that case reversed the decree of the court below.

THE MASTER OF THE ROLLS:—It is clearly settled that a mere security for the payment of the price stated in a conveyance, will not discharge the lien<sup>2</sup> which courts of equity give to a vendor, where the price is unpaid. The security is considered as simply for payment of the price; and, if the price be not paid, the lien remains.

The question in this case is, whether the transaction between the vendor and vendee was a security for the price, or a substitution for the price. The consideration stated in the conveyance was the sum of 3,000*l.*; but the contract of the vendor and vendee was, that in lieu of the sum of 3,000*l.*, the vendor should accept an annuity of 100*l.* payable during the lives of the vendor and her intended husband, if the vendee should so long live; and that his personal representatives should, within three months after his decease, in certain events only, but not in all events, pay the further sum of 3,000*l.* This arrangement is carried into effect by the bond of the vendee conditioned accordingly; and the receipt indorsed on the purchase deed is in these words;—

[\*662] "Received on the day and year first within \*written, of and from the within named Jasper Parrott, a bond for the sum of 3,000*l.*, being the full consideration within expressed to be given by him."

It is plain, therefore, that this is not the case of a security, but a substitution for the price, which the vendor has agreed to accept, and that the lien for the purchase money is consequently discharged.

*June 8th and 29th.*—The defendant having presented a petition of rehearing against the decree of the Master of the Rolls, the cause came on for argument before the Vice-Chancellor, Sir Lancelot Shadwell and Mr. Justice Bosanquet, sitting as Lords Commissioners.

(a) 15 Ves. 329.

(b) 4 Russ. 336.

(c) 3 Sim. 499. And see *White v. Wakefield*, 7 Sim. 401.

(d) 1 Sim. &amp; Stu. 434, reversed on appeal, 3 Russ. 488.

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Mr. Preston, Mr. Jacob and Mr. Bacon in support of the decree.

Mr. Tinney and Mr. Tyrrell for the appeal.

The same topics of argument as had been addressed to the court below, were urged at great length on the rehearing. The following additional authorities were cited and commented upon; *Pollexfen v. Moore*,<sup>(a)</sup> *Fawell v. Heelis*,<sup>(b)</sup> *Tardiff v. Scrugham*,<sup>(c)</sup> *Comer v. Walkley*,<sup>(d)</sup> *Nairn v. Prowse*,<sup>(e)</sup> *Hughes v. Kearney*,<sup>(g)</sup> *Elliot v. Edwards*,<sup>(h)</sup> *Ex parte Loaring*,<sup>(i)</sup> *Ex parte Parkes*,<sup>(k)</sup> *Wythe v. Henniker*.<sup>(l)</sup>

LORD COMMISSIONER SHADWELL, in delivering the judgment of the court, after stating the facts of the case, and the \*deed of release, and the receipt indorsed upon it, pro- [\*663] ceeded.

It then appears, that by an instrument of even date with the release, and which must be construed in the same manner, and as if it formed part of one entire transaction with it, the father became bound to the intended husband in the penal sum of 6,000*l.*; and the following condition was annexed to the bond: [His Lordship read the condition.] Upon the first reading of this instrument, the question naturally arises, whether anything else was, or could be in the contemplation of the parties, than that the father, having regard to the circumstances of his property, should give a bond for payment of a sum of 3,000*l.* to such persons, and upon such contingencies as were therein expressed, with a power, nevertheless, to vary the arrangement at any time, on condition of his doing quite a different thing, namely, giving a fortune of 3,000*l.*, in one event to the husband, and in another event to the wife, exclusive of the children, and that the daughter should release the equity of redemption to him, and that he, acquiring that equity, should of course take upon himself the payment of the mortgage debt. The whole of this transaction, it is obvious, was carried into effect with the approbation of the intended husband, who was content to accept the bond in question as the fortune of his wife.

In *Winter v. Lord Anson*<sup>(m)</sup> Lord Lyndhurst, in his judgment on the appeal, observing upon the circumstances of that case, said that as there was nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest infer-

(a) 3 Atk. 272.

(b) Amb. 724.

(c) Stated 1 Bro. C. C. 422.

(d) Sugd. V. & P. 547, 7th ed.

(e) 6 Ves. 752.

(g) 1 Scho. & Lef. 132.

(h) 3 Bos. & Pull. 181.

(i) 2 Rose, 79.

(k) 2 Gl. & Jam. 81.

(l) 2 Mylne & Keen, 635.

(m) 3 Russ. 488.

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ence that such was the intention of the parties, he thought [\*664] it should be \*declared that the plaintiffs had a lien upon the estate in question for the residue of the purchase money.

From that passage in his judgment, it is manifest that, in Lord Lyndhurst's opinion, the proper way of dealing with questions of this kind is, to look at the instruments executed by the parties at the time, and upon them to declare what the meaning of the parties must have been.

The present appeal has been argued as if it were a naked case of vendor and purchaser: but to us it rather appears to be a sort of family arrangement, entered into between a father and his daughter, together with her intended husband, and having for its object to provide for the wife and family, in a great variety of different modes, according to different contingencies, and in a manner utterly inconsistent with the notion of a payment of purchase money.

The 3,000*l.* which were to be paid by the executors of Mr. Parrott to Mr. and Mrs. Orlebar, in case either of them survived Mr. Parrott and his wife, was a *chose in action*, which might have been settled or dealt with by Mr. and Mrs. Orlebar in any way they pleased, without reference to the interests of their issue. It is clear, at any rate, that there were certain events in which the children might be entitled to the money, and that there were also other events in which the husband or wife might be so entitled; and it is manifest, therefore, upon the face of the bond itself, that the parties were really dealing for a totally different thing from an absolute sum of 3,000*l.*, the sum which is assumed in the appellant's argument to have been the consideration for the estate.

[\*665] \*The release contains no statement or recital of any agreement to sell the estate for the price of 3,000*l.*; and in the operative part, it is merely witnessed that in consideration of the premises and of the covenant, and in consideration of the sum of 3,000*l.* advanced, or agreed to be advanced or secured to Miss Parrott, in contemplation of her intended marriage with Mr. Orlebar, upon the terms expressed in a bond of even date, she, Miss Parrott, sold and conveyed the estate to her father. From these expressions it is obvious that the parties did not treat the consideration as a mere sum of 3,000*l.* And then the bond itself is so framed, that the very receipt, which was given for it, testifies what was the real object of the parties. The acknowledgment indorsed upon the release, is not a receipt for the sum of 3,000*l.* as the consideration therein expressed, but it is, strictly and grammatically, a receipt for the bond given to secure that amount, being (that is, the bond being,) the full consideration within expressed. Now, if it appears, as in our opinion it



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 1834.—Hughes v. Turner.
 

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clearly appears, upon the face of these instruments, and from the nature of the transaction, that the parties were bargaining for a security, and not for a stipulated sum, no question of lien arises, because here the purchaser has actually received the consideration.

We therefore decide, in conformity with the very principle laid down by Lord Lyndhurst in *Winter v. Lord Anson*, (although upon the special circumstances in that case, his Lordship came to an opposite conclusion as to the fact,) that the objection to the plaintiff's title, set up by the appellant, on the ground of lien, cannot be supported.

We are of opinion, that it is clear, upon the face of the instruments themselves, that the lady has got everything \*which she bargained for, that she was, in effect, paid by [\*666] the receipt of the bond, and that the lien therefore does not exist.

Decree affirmed without costs.

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#### HUGHES v. TURNER.

1834: 25th July. 1835: 24th and 25th February, and 16th April.

M. D. by a codicil to her will, duly attested to pass real estate, revoked an annuity given by her will, and after reciting that one of the trustees named in her will was dead, she revoked the estates and powers given by her will to such deceased trustee, and devised the same to a new trustee, thereby placing the new trustee in the place and stead of the deceased trustee, as trustee for the purposes of her said will. She then gave a legacy to the new trustee, on consideration of his taking on himself the trusts thereby in him reposed, and she revoked a legacy given to the deceased trustee:

Held, on a rehearing, that this codicil did not operate as a republication of the testatrix's will, so as to pass an estate purchased between the date of the will and the date of the codicil.

A general gift, to operate as an execution of a power, must either refer to the power, or to the subject of it; and a reference to a part of the subject, or to some of many subjects of the power, will not be sufficient to make a will operate as an execution of the power, where there is no other indication of an intention to execute it.

MARTHA DAVIES, by her will, dated the 13th of December, 1808, after charging all her real and personal estates with the payment of her debts and legacies, and giving some pecuniary legacies, gave, devised and bequeathed all the rest, residue and remainder of her real and personal estates, of what nature or kind soever, and wheresoever situate, to John Hilton and John Oswald Trotter, upon trust to receive the rents, dividends, interest and annual produce thereof, and pay the same into the hands of her sister, Elizabeth Leighton Bonsall, for her sole and separate use during her life, exclusive of her husband, George Bonsall, or any husband whom she might thereafter marry; and from and upon the death of her said sister, Elizabeth Leighton Bonsall,

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upon trust to pay, apply and dispose of all and singular the said trust moneys and premises, to such person and persons, [\*667] in such parts, shares and \*proportions, and in such manner and form, upon such trusts, and for such intents and purposes, and charged and chargeable in such manner and form, and subject to such powers, conditions and limitations as Elizabeth Leighton Bonsall, notwithstanding her coverture, should, by her last will and testament in writing, or any codicil or codicils thereto, to be by her signed and published in the presence or three or more credible witnesses, give, devise, direct, limit, or appoint. And in default of such direction, limitation, or appointment, or in case any such should be made which should not extend to the entire disposition of the said trust premises, then, subject thereto, and as to so much of the said trust premises whereof no effectual gift, devise, direction, limitation, or appointment should be made, upon trust for the said George Bonsall, his heirs, executors and administrators. And the testatrix thereby appointed George Bonsall and Elizabeth Leighton Bonsall, executor and executrix of her will.

The testatrix, at the date of her will, had no property in the county of Cardigan. In the month of February, 1812, she purchased an estate called Fynnon Wen, in the county of Cardigan; and she afterwards made a codicil to her will, duly attested to pass real estate, and dated the 5th of August, 1815, in the following words:—

“Whereas, I have, by my will, given to Mary Langford, widow, the annual sum of 100*l.*, now I do hereby revoke and make void the said gift, bequest and annuity so given to the said Mary Langford, together with all powers and provisions relating thereto. And whereas, John Hilton, a trustee named in my said will, is dead, I do, therefore, hereby revoke all estates, rights, powers, trusts, restrictions and authorities by my said will, given unto the said John Hilton, his heirs, executors and [\*668] \*administrators. And I do hereby give, devise and bequeath unto Sharon Turner, his heirs, executors and administrators, all and singular the estates, rights, interest, powers, trusts, restrictions and authorities, so by my said will devised and bequeathed to the said John Hilton, in such and the same manner as the same were vested in the said John Hilton, the same to be hereby vested in, and held by the said Sharon Turner, jointly with John Oswald Trotter, in my said will named, hereby placing the said Sharon Turner, in the place and stead of the said John Hilton, as trustee for the purposes of my said will. I also give to the said Sharon Turner, the sum of 500*l.*, in consideration of his taking on himself the trusts hereby in him reposed. The same to be also the consideration for the legacy by my said will given to the said John Oswald Trotter. And I do hereby

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revoke the legacy of 200*l.* by my said will given to the said John Hilton."

Martha Davies died in the month of October, 1815, leaving Elizabeth Leighton Bonsall, her sister and heiress at law.

George Bonsall and Elizabeth Leighton Bonsall, the executors named in the will of Martha Davies, proved her will, and after having paid her debts and legacies, delivered over to the trustees the residue of her personal estate, with the exception of a few articles which remained in the possession of Mrs. Bonsall, and with respect to which a material question was raised in this cause. The trustees also took possession of the real estates of the testatrix.

Elizabeth Leighton Bonsall made a will, dated the 16th of December, 1815, attested by three witnesses, whereby, after reciting, among other things, the will and codicil of her sister Martha Davies, and the power of \*appointment [\*669] given to her, Elizabeth Leighton Bonsall, by that will, she proceeded as follows:—"Now in pursuance and by virtue of every right, power or authority to me given in and by the said last will and testament and codicil of my said late sister, and by virtue of every other right, power or authority, enabling me in this behalf, and in the execution thereof, I, the said Elizabeth Leighton Bonsall do, by this my last will and testament, by me duly signed, sealed and published in the presence of the three credible persons whose names are intended to be subscribed as witnesses attesting the execution thereof, direct, limit and appoint that the said Sharon Turner and John Oswald Trotter, their heirs, &c., do and shall, immediately after my decease, convey, assign and assure unto and to the use of John Jones, Sharon Turner and Samuel Pearce Parson, their heirs, executors, &c., all the real and personal estate of my said late sister, Martha Davies, now vested in them, the said Sharon Turner and John Oswald Trotter, or over which I have any disposing power, upon the trusts hereinafter declared, concerning the same; that is to say, as to the sum of 4,000*l.*, part thereof, upon trust to invest the same, and pay to or permit John Gould to receive the interest and dividends thereof for his life, and after his decease to pay to or permit the wife of John Gould to receive the same during her life."

After the decease of the survivor, the testatrix directed the principal to be divided among all and every the child and children of John Gould, share and share alike, when they should respectively attain the age of twenty-one years, with benefit of survivorship, if any should die under that age. And if all the children should die under the age of twenty-one years, then the principal sum of 4,000*l.* to fall into and go along with the residue of the estate of Martha Davies.

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[\*670] \*The will then proceeded: "And as to the sum of 200*l.*, further part of the trust premises, in trust for Mary Anne Honor Parson, sister of Samuel Pearce Parson. And as to the sum of 1,000*l.*, in trust for my goddaughter Martha Elizabeth Turner, daughter of the said Sharon Turner, to be a vested interest immediately upon my decease, and I direct that the said sum of 1,000*l.* and interest be paid to Sharon Turner, his executors, &c., to be applied for the benefit of the said Martha Elizabeth Turner, &c. And in trust, as to all that freehold messuage, land, hereditaments and premises purchased by my said late sister in the county of Cardigan, called Fynnon Wen, and all that slang, or piece or parcel of land in the parish of Llanbadarn Faur, in the county of Cardigan, also purchased by her, and all other the real estates purchased by my said sister in Wales, in trust for the said Sharon Turner, for and during the term of his natural life. And from and after his decease, in trust for Alfred Turner, son of the said Sharon Turner, his heirs and assigns forever. And in case the said Sharon Turner, and the said Alfred Turner shall die in my lifetime, then in trust for William Turner, the second son of the said Sharon Turner, his heirs and assigns forever. And in case the said Sharon Turner, Alfred Turner and William Turner shall die in my lifetime, then upon the trusts hereinafter mentioned. And I give and bequeath to my said goddaughter, Martha Elizabeth Turner, the pianoforte, which belonged to my late sister Martha. Also I give and bequeath unto Mary Turner, the wife of the said Sharon Turner, all my wearing apparel, table and bed linen, lace, trinkets, watches, plate, china, jewels and books which I have in any way the power of giving or disposing of. And, as to all that freehold estate purchased by my said late sister in the county of Cardigan, and all other the real estate purchased by my

[\*671] said sister \*in Wales, from and after the events and contingencies hereinbefore mentioned concerning the same, and also as to all the rest, residue and remainder of the said real and personal estate over which I have any disposing power, under and by virtue of the last will and codicil of my said late sister, I declare and direct that the said John Jones, Sharon Turner and Samuel Pearce Parson, and the survivors of them, &c., shall and do stand, and be seised, possessed of, and interested in the same, in trust for themselves, the said John Jones, Sharon Turner and Samuel Pearce Parson. And I do hereby give, direct, limit and appoint the same to the said John Jones, Sharon Turner and Samuel Pearce Parson, their respective heirs, executors and administrators, equally to be divided among them, share and share alike, as tenants in common, and for their own respective absolute use and benefit. And if any one or more of them, John Jones, Sharon Turner and Samuel Pearce Parson,

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shall die in my lifetime, then their share or shares shall not lapse, but shall be paid to such person or persons as shall be his or their respective heirs, executors and administrators, absolutely and forever; and, so far as the law enables me in this behalf, I constitute and appoint the said John Jones, Sharon Turner and Samuel Pearce Parson executors of this my will. And I hereby revoke all my former wills, and I give to my servant, Mary Langford, 300*l*."

The testatrix made a codicil to her will, dated the 31st of March, 1818, containing directions as to her sister's monument, and as to the erection of a similar monument for herself, and confirming and republishing her will.

On the 20th of March, 1819, she made a second codicil, in which, after reciting the death of Samuel Pearce Parson, \*and the appointment which she made by her will to [\*672] Jones, Turner and Parson, upon the trusts therein declared, and, among others, as to the 200*l*. for Mary Anne Honor Parson, the 1,000*l*. for her goddaughter Martha Elizabeth Turner, and as to the freehold estates at Fynnon Wen and the piece of land in the parish of Llanbadarn Faur for Sharon Turner and his sons, and as to the pianoforte of her sister for her goddaughter, and as to her wearing apparel, table and bed linen, lace, trinkets, &c., to Mary Turner, wife of Sharon Turner: and as to all the rest, residue and remainder of her said real and personal estate, over which she had any disposing power, under the will and codicil of her sister, she gave Parson's share of the residue to her husband, George Bonsall, if he should survive her, confirmed the appointment of the other two parts of the residue to Jones and Turner, and proceeded as follows: "And I also give, direct, limit and appoint to my said husband, during the term of his natural life, all that said freehold messuage, lands, hereditaments and premises at Fynnon Wen, and at Llanbadarn Faur; and after his decease, then I give and appoint the same to the said Sharon Turner, and to his sons Alfred and William, their heirs and assigns, as mentioned and appointed by my will. And I give and appoint to George Bonsall the carriages and horses and all the household furniture over which I have any disposing power; but the pianoforte, wearing apparel, lace, trinkets, watches, jewels and other effects, I give and appoint to Martha Elizabeth Turner, and Mary Turner as mentioned in my will. And I will and appoint that my funeral and testamentary expenses, and the costs of my sister's monument and my own be paid out of the said last mentioned residue, before the same is divided; and I revoke and annul the said sum of 200*l*. given to Mary Ann Honor Parson, and also the sum \*of 300*l*. given by my [\*673] will to Mary Langford: and instead thereof, I direct my executors to pay to the said Mary Langford the sum of 5*l*. a year

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during<sup>\*</sup> her natural life, out of the said residue; and I appoint the said John Jones and Sharon Turner executors of my said will, and confirm my said will, and the codicil thereto annexed, in all respects in which the same have not been altered by this my last codicil; and do declare the said will and codicil to be, with this present codicil, my last will and testament, and revoke all others.

The testatrix made a third codicil to her will, dated the 22d of October, 1824, by which, after reciting the death of her husband, George Bonsall, she gave to her surviving executors and trustees all that by her codicil she had given and bequeathed to her husband, George Bonsall; and in other respects she confirmed and republished her will, and former codicils.

George Bonsall, the husband of Elizabeth Leighton Bonsall, died without issue, having made a will, dated the 15th of April, 1822, by which he devised the residue of his real estate, in the events which happened, to trustees for his sister, the plaintiff, Mary Hughes, for her life, with divers successive remainders to persons made defendants to this suit. His heir at law was also made a party defendant; he died intestate as to his personal estate, and the plaintiff, Mary Hughes, and other parties, defendants, were his next of kin.

On the 26th of October, 1829, Elizabeth Leighton Bonsall made a will, duly attested to pass real estate, in the following words:

"This is the last will and testament of me, Elizabeth Leighton Bonsall, widow. I desire to be buried in the old parish [\*674] church of Aberystwith, in the county of Cardigan, in the principality of Wales, in the same vault with my late sister. I desire that the sum of 400*l.* be laid out in erecting a monument to my memory, similar to the monument of my said late sister, in the church of Aberystwith. I will and desire that my funeral and testamentary expenses be first paid, and then I give and bequeath unto my friend, Mrs. Mary Lawrence, the sum of 500*l.*, and also my best set of pearls, for her own sole and separate use, free from the debts and engagements, and not to be subject to the power or control of her present, or any future husband. I give and bequeath to my friend, Mrs. Mary White, the sum of 500*l.*, and also all my trinkets (except the set of pearls bequeathed as aforesaid, and my watches.) I give and bequeath unto my friend, Mrs. Scarborough, now residing with the said Mrs. Mary White, the sum of 500*l.*, and also a plain gold watch, which belonged to my sister, for her own sole and separate use, free from the debts and engagements, and not to be subject to the power or control of her present or any future husband. I give and bequeath unto my friend, Mrs. Hawkins, the sum of 300*l.* I give and bequeath unto my friend, Miss Hinds, now re-

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siding with me as a companion, the sum of 300*l.*, and also all my furniture, clocks, watches, books, pictures, glass, linen and wearing apparel, and my pianoforte and music books. I give and bequeath unto my friend, Mr. Jonathan Haynes, the sum of 500*l.* I give and bequeath unto my friend, Mr. Sharon Turner, the sum of 50*l.*, and unto Mr. Alfred Turner, his son, the sum of 50*l.* I give and bequeath unto my friend, Mr. John Gould, of Brompton, in the county of Kent, solicitor, the sum of 3,000*l.*; but if the said John Gould should happen to die before me, then I will that the said sum of 3,000*l.* should be equally divided between and amongst such of the children of the said John Gould as shall be living, at the \*time of my decease. I [\*675] give, devise and bequeath all my freehold and copyhold estates in the county of Middlesex aforesaid, and Cardigan, in the principality of Wales, and elsewhere, unto my relation, John Jones, of Yrstrad, in the county of Carmarthen, in the said principality, esquire, member of Parliament, his heirs and assigns forever. And as to all the rest, residue and remainder of my estates and effects, whatsoever and wheresoever, whether real or personal, plate, moneys, leasehold, mortgages, bonds or other securities for money, stocks, funds, or other property, and whether in possession, reversion or expectancy, or held in trust for me, I give, devise and bequeath the same, and every part thereof, unto the said John Jones, his heirs, executors, administrators and assigns forever. And I do hereby nominate the said John Jones, and the aforesaid Jonathan Haynes, executors of this my will, at the same time revoking and making void all and every other will and wills by me at any time, heretofore made, and declaring this only to be my last will and testament."

The testatrix made a codicil to this will, dated the 14th of June, 1830, by which she gave to Sharon Turner, 3,000*l.* at his death to be equally divided between his family, and some other pecuniary legacies.

On the 25th of February, 1831, the last mentioned will and codicil were proved by John Jones and Jonathan Haynes, the executors therein named, in the Prerogative Court of Canterbury.(a)

(a) The Prerogative Court of Canterbury afterwards decreed a grant of administration of the will of the 16th December, 1815, and three codicils, to the nominee of Sharon Turner, "limited only to become a party to, and to attend, supply, substantiate, and confirm proceedings in the Court of Chancery touching and concerning the execution of the power of appointment under the wills and codicils of the deceased, or either of them:" but the court directed that such limited administration should be without prejudice to the probate granted to Jones and Haynes. Against that decree of limited administration an appeal was brought to the court of delegates. That court reversed the decree of limited administration, and afterwards, upon the petition of Sharon Turner and William Turner, praying that the grant of probate to Jones and Haynes might be revoked, and on the petition of Jones and Haynes, praying that the same probate might be confirmed, the cause was heard before the same

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[\*676] \*The bill was filed by James Hughes and Mary Hughes, his wife, against Sharon Turner, the surviving trustee under the will of Martha Davies, against John Jones and Jonathan Haynes, the executors of Mrs. Bonsall, against the Rev. Isaac Bonsall, the administrator, with the will annexed, of George Bonsall, and against other parties, as well those who claimed an interest in the personal or real estate of George Bonsall, as those who were interested in supporting the validity of the appointment, under the first will and codicils of Mrs. Bonsall, so far as the real estate of Martha Davies was concerned. The plaintiffs, by their bill, submitted that the residuary personal estate of Martha Davies became, in default of appointment, part of the general residue of the personal estate of George Bonsall, and that the same ought to be distributed between the plaintiff, Mary Hughes, and the defendants, the other next of kin of George Bonsall; and that the residue of the real estate of Martha Davies also became, in default of appointment, part of the real estate of George Bonsall, and belonged to the plaintiff, Mary Hughes, and the other devisees under his will, according to their respective interests therein. And the bill \*prayed that it might be declared that the power of appointment, given by the will of Martha Davies to Elizabeth Leighton Bonsall was never executed, and that the plaintiff, Mary Hughes, and the other parties, defendants, according to their respective interests, might be declared to be entitled, in default of such appointment, to the residue of the personal and real estates of Martha Davies.

By the decree made at the hearing, on the 20th of June, 1833, special inquiries were directed for the purpose of ascertaining the property which Mrs. Bonsall possessed, and the property over which she had a power of disposition; and the Master found that the trustees of Martha Davies' will were seised of an estate in Cardiganshire, called Troedrhieu Castell, conveyed to them upon the trusts of that will; that the lands Fynnon Wen, in the county of Cardigan, having been purchased by Martha Davies, after the date of her will, descended to Elizabeth Leighton Bonsall, as her heiress at law, unless the codicil, executed subsequently to the purchase, was to be considered as a republication of the will, and, subject to the opinion of the court on that point, the Master found that Elizabeth Leighton Bonsall was, at the date of her will made in 1829, seised in fee of the lands at Fynnon Wen. And he found that E. L. Bonsall, at the date of the will made in 1829, was seised in fee of a messuage in the county of Middlesex, and possessed of a leasehold messuage in the same county;

judges delegate, who confirmed the probate of the will of the 26th of October, 1829, and codicil, granted to Jones and Haynes, holding that the intention of the testatrix to revoke the former will, was, taking all the contents of the latter will together, clear. See 4 Hogg. Eccl. Rep. 30, where the case is fully reported.



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and that she was absolutely entitled in equity to a mortgage for 5,000*l.*, charged upon certain estates called Twedyluckba, situate in the county of Cardigan, which were conveyed in fee to the trustees of her marriage settlement, subject to redemption on repayment of the mortgage money and interest; and that she was not seised in fee simple, nor had power to dispose of any \*real estates situate in the counties of Middlesex and [\*678] Cardigan, except as therein before stated. And he found, that, at the date of the will made in 1829, E. L. Bonsall was in possession of a plain gold watch, a pianoforte and several music books, which all belonged to or formed part of the property of Martha Davies.

The questions in the cause were, first, whether the codicil to the will of Martha Davies, operated as a republication of the will so as to pass the real estate, purchased between the date of the will and that of the codicil; and, secondly, whether the will of Elizabeth Leighton Bonsall, dated the 26th of October, 1829, was, or was not, a good execution of the power given to her by the will of Martha Davies. A third question, raised by the parties interested in supporting the validity of the appointment made by the will of E. L. Bonsall, dated the 16th of December, 1815, was whether that instrument, though revoked by the subsequent will as to the personal estate, was not a good execution of the power with respect to the real estate of Martha Davies.

Mr. *Pemberton* and Mr. *Richards* for the plaintiffs:—It cannot be disputed that the will of 1815 and codicils, had they remained unrevoked, would have operated as a good execution of the power given to Mrs. Bonsall by the will of her sister, Martha Davies. Mrs. Bonsall in these instruments refers, in the most express and formal language, to the power; and she disposes fully of all the property, both real and personal, over which the will of her sister had given her the power of disposition. As to the personal estate, the will of 1815, and the three codicils have been rejected by the Ecclesiastical Court, the original grant of probate to the executors of the will of 1829, having been confirmed, after an elaborate argument, by the court of delegates.

\*The will of 1815 and codicils, therefore, may be con- [\*679] sidered as a nullity; and cannot be brought in aid of the questions which this court is called upon to decide. In the will of 1829, which has been finally established by the court of delegates, and which is the only instrument that can be looked at for the purpose of determining whether the testatrix has exercised the power of disposition given by the will of her sister, there is no reference whatever to the power; neither is there any mention of the property of Martha Davies, from which an inten-

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tion of exercising the power can be implied. Now it is a settled principle, that there must either be a reference to the power, or such a disposition of the subject of the power, that the intention of executing the power may be plainly inferred; *Sir Edward Clere's case*; (a) *Andrews v. Emmot*. (b) In this case the testatrix gives to one of the legatees, the sum of 500*l.*, and also a plain gold watch "which belonged to my sister;" but it is evident that she considered the watch as her own, the words "which belonged to my sister," being mere words of description; and as to the pianoforte and music books, bequeathed to another legatee, and which have been found by the Master to have been the property of Martha Davies, she expressly calls them "my pianoforte and music books." These trifling articles were either given to Mrs. Bonsall by Martha Davies in her lifetime, or suffered to remain in the possession of Mrs. Bonsall by the trustees of the will of Martha Davies; and it is impossible to infer from the specific bequest of these articles, which the testatrix considered, as they were in fact, her own, that she intended to exercise her power of appointing to the whole of Martha Davies' personal estate.

[\*680] \*Even if it were clear that the watch, pianoforte, and music books constituted a part of Martha Davies' property, over which Mrs. Bonsall had a power of appointment, the bequest of these articles coupled with the general residuary bequest of all her effects, would not, according to the authorities, operate as an execution of her power. The court must find an intention to execute the power; and it is impossible to infer an intention to dispose of property exceeding the value of 20,000*l.* from the bequest of a few articles not worth 20*l.*, and which the testatrix considered and describes as her own.

As to the real estate, the first question is, whether the Cardigan estate, which was purchased by Mrs. Davies, between the date of her will and that of the codicil, passed by the codicil; for, if it did not, it descended upon Mrs. Bonsall, and no question can arise as to the execution of the power with reference to that estate. In *Bowes v. Bowes*, (c) which is the leading case upon this point, the testator devised all his freehold and copyhold lands to trustees, and afterwards purchased new lands. Subsequently to the purchase, he made a codicil to his will, by which, after reciting that he had devised all his freehold and copyhold lands, tenements and hereditaments, he revoked the devise so far as it related to two of his trustees, and devised his said lands, tenements and hereditaments to the other trustees upon the same trust, and declared his codicil to be a part of his

(a) 6 Co. 18 a.

(b) 2 Bro. C. C. 297.

(c) 2 Bos. &amp; Pull. 500.

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will. Upon a case sent to the Court of King's Bench,<sup>(a)</sup> that court returned a certificate that the after-purchased lands did not pass: Lord Loughborough decided the case in conformity with the opinion of the Court of King's Bench; and his decision was affirmed, upon appeal, by the \*House of Lords. [\*681] The principle upon which cases of this kind have been determined, is this; that where a will contains a general devise of real estates, and estates are purchased afterwards, and a codicil made after the purchase, the codicil will pass the after-purchased estates, if it confirm the will generally, and contain nothing to indicate a different intention; but if the codicil is made for a particular purpose, or deals only with specific dispositions of the will, the presumption of a general intention to republish the will, and bring it down to the date of the codicil, will be rebutted. Where the expressed object of the codicil is so limited, an intention to include the after-purchased estates cannot be presumed, because the framer of the codicil has himself shown the particular reason for which the codicil was made. The main object of Mrs. Davies' codicil was to substitute a new trustee for the purposes of her will, in place of the trustee who had died; and so far the case is not distinguishable from *Bowes v. Bowes*. Another object of the codicil was, to revoke the legacy given to Mary Longford; and the case of *Monypenny v. Bristow*,<sup>(b)</sup> has decided, that where the dispositions of a codicil are confined to property devised by the will, the codicil will not have the effect of republishing the will, so as to carry after-purchased property. *Monypenny v. Bristow* is an extremely strong case, for there the codicil contained a recital referring to the whole of the testator's real estates, which of course included the estates of which he was seised at the date of the codicil, and yet, as the dispositive part of the codicil related only to property devised by the will, it was held both in this court and upon appeal, that no intention of passing the after-purchased estates could be inferred from the language of the codicil.

\*As to Mrs. Bonsall's devise of all her estates in the [\*682] counties of Middlesex and Cardigan, it has been found by the Master, that she had property in both those counties, other than that to which she had a power of appointing under the will of her sister; and it has been decided, that where the words of a devise can be satisfied by estates belonging to the deviser, and there is no reference to the power, such words shall not operate so as to pass estates over which the deviser has a mere power of appointment; *Napier v. Napier*,<sup>(c)</sup> *Lewis v. Lewellyn*.<sup>(d)</sup>

<sup>(a)</sup> *Lady Strathmore v. Bowes*, 7 T. R. 482.<sup>(b)</sup> 2 Russ. & Mylne, 117.<sup>(c)</sup> 1 Sim. 28.<sup>(d)</sup> 1 Turn. & Russ. 104.

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The will of 1815, therefore, is not an execution of the power, either as to the personal or the real estates; and as that will has been finally declared by a court of exclusive jurisdiction to have revoked the dispositions of the prior will as to the personal estate, it is not very probable that this court will come to a different conclusion as to the real estate. If, then, the testamentary appointment of 1815 was revoked by the will of 1829, and the latter will is no execution of the power, the plaintiff, Mary Hughes, is, in default of appointment, entitled to the declaration which she prays by her bill.

Mr. Barber, Mr. Treslove, Mr. Tinney, Mr. Spence and Mr. R. Martin, for defendants in the same interest as the plaintiff, cited and commented upon the following cases;—*Doe*. dem. *Nowell v. Rouke*, (a) *Powell v. Lozdale*, (b) *Jones v. Curry*, (c) *Farmer v. Bradford*, (d) *Adams v. Austen*, (e) *Onions v. Tyrer*, (g) *Hughes* [\*683] *v. Turner*, (h) *Wallop v. Lord Portsmouth*, (i) *Standen v. Standen*, (k) *Bailey v. Lloyd*, (l) *Hunlock v. Gell*, (m)

Mr. Beames and Mr. Kindersley, for the defendants, Sharon Turner and Alfred Turner, contended that the will of 1815, though it was declared by a court of competent jurisdiction to have been revoked *pro tanto*, and could, therefore, have no effect as to the personal estate, was not wholly revoked as to the real estate; and that so far as it related to the estates over which Mrs. Bonsall had a power of disposition, it was a good testamentary appointment. The general clause of revocation, in the will of 1829, must be understood with reference to the subject matter intended to be revoked. It could apply only to a proper will, not to an appointment in the nature of a will. There was no substitution in the will of 1829, for the appointment of the real estates made by the will of 1815, and, therefore, the clause of revocation in the last will did not affect the appointment in the prior will. *Onions v. Tyrer*, (n) *Powell v. Mouchett*, (o) *Denny v. Barton*, (p)

Mr. Jacob and Mr. Blake for the heir at law of George Bonsall.

Mr. Bickersteth and Mr. Wilson for the defendants Jones and Haynes:—If a devise be made by a person, having a power of

(a) 2 Bing. 497; 5 B & C. 720; and 6 Bing. 474.

(b) 2 B. & Ald. 291.

(c) 1 Swan. 66.

(d) 3 Russ. 354.

(e) Sugd. Powers, Vol. II, 6th edit. App. 12.

(f) 2 Ves. jun. 589.

(g) 5 Russ. 341.

(h) 1 Russ. & Mylne, 515.

(i) 3 Russ. 461.

(j) 1 P. Wms. 345.

(k) 4 Hagg. Eccl. Rep. 30.

(l) 1 P. Wms. 345.

(m) 6 Mad. 216.

(n) 2 Phillim. 575.

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appointment, in terms applicable to property distinct  
 \*from the subject of the power, it will not operate as an [\*684]  
 execution of the power. Thus Mrs. Bonsall had real estate of her own in the county of Middlesex; and there was real estate in that county vested in the trustees of Mrs. Davies' will, over which she had a power of disposition. "A devise of all my estate in the county of Middlesex," will properly apply to her own property; and therefore cannot apply, according to this rule, to the property over which she had a power of disposition. On the other hand, if the devise be made in terms which can only apply to the subject of the power, it will operate as a good appointment, though no reference be made to the power. Thus "a devise of all my real estates in the counties of Middlesex and Cardigan," is a good execution of the power as to the Cardigan estates, because the testatrix had no real estate in Cardigan, other than that over which she had a power of appointment. There was the estate at Fynnon Wen, which she had expressly treated as a subject of her power in the will of 1815. There was, besides this, another estate in Cardiganshire over which she had a power of disposition. By the will of Martha Davies, the trustees were empowered to invest any portion of her personal estate in the purchase of land with the consent of Mrs. Bonsall; and they did, accordingly, in the year 1824, purchase with her consent an estate in Cardiganshire, called Troedrhieu Castell, which was conveyed to them by a deed, reciting the will of Martha Davies, upon the trusts of that will. This property, therefore, was a subject of the power newly created. The will of 1829 does not specifically refer to the power, but it deals with property which Mrs. Bonsall could only dispose of by virtue, and in execution of the power. The gold watch, the pianoforte, and the music books are found by the Master to be part of the trust property bequeathed by the will of \*Martha [\*685] Davies to her trustees; and this portion of the property is specifically bequeathed by Mrs. Bonsall. The Cardigan estates, which are part of the real estates held in trust for her, are specifically devised, and she concludes by disposing of all the rest of her estates and effects, whether real or personal, and whether in possession, reversion or expectancy, or held in trust for her. These dispositions bring the case exactly within the principle of the authorities by which it has been decided, that a specific devise or bequest of a part of the property, over which the testator has a power of appointment, followed by a general devise of the residue, is a good execution of the power. In *Standen v. Standen*,<sup>(a)</sup> the testatrix, who had a power of appointment by will to one-half of the produce of her deceased hus-

(a) 2 Ves. jun. 589.

1834.—Hughes v. Turner.

date of the codicil. Mrs. Davies, in general words, devises all her real and personal estate to trustees. If these words are referred to the date of the codicil, the Cardigan estate necessarily passes to the trustees as a part of the real estate of Mrs. Davies. The first clause in the codicil, referring to the will, revokes a pecuniary legacy given by the will to Mary Langford, and, by the general rule, the will is republished as to land. It is argued, that a contrary intention is to be inferred from the subsequent part of the codicil. The codicil proceeds to notice the death of Mr. Hilton, one of the trustees named in the will, and revokes all estates, interests powers, and authorities, given by her will to [\*689] Mr. Hilton, and then \*vests those estates, interests, powers and authorities, in Mr. Turner. This part of the codicil, so far from raising an inference of an intention on the part of Mrs. Davies not to republish the will, would in itself have amounted to a republication. A question might possibly have been raised, whether Mr. Turner became a trustee of the after-purchased estate, which could not pass by the will; but no serious doubt could be raised, even upon that point. It appears to me, therefore, to be clear that the will was republished by the codicil, and that the after-purchased estate passed to the trustees appointed by the codicil.

In the year 1815, Mrs. Bonsall makes a will, expressly referring to the power of disposition given to her by her sister, Mrs. Davies, and exercising it to its fullest extent: she subsequently makes three codicils to this will, plainly referring to this power. In 1829, after her husband died, Mrs. Bonsall makes the will in question, which begins by referring to the monuments for her sister and herself, which had been the subject of the first codicil to her will of 1815. She then gives certain pecuniary and specific legacies; and, amongst others, a plain gold watch, which, she states, had belonged to her sister, and a pianoforte and music books, which the Master found had also been the property of her sister. She then devises all her freehold and copyhold estates in the county of Middlesex, and in Cardigan, and elsewhere; and as to all the rest, residue and remainder of her estate and effects whatsoever and wheresoever, (whether real or personal, and whether in possession, reversion, or expectancy, or held in trust for her,) she gives the same, and every part thereof, to the defendant, John Jones, his heirs, executors, administrators, and assigns, forever; and, after nominating her executors, she [\*690] revokes and makes void all and every \*other will and wills, by her at any time theretofore made, declaring that only to be her last will and testament: and this will is executed and attested in the manner required for the execution of the power given to her by the will of Mrs. Davies. There is here, in words, no express reference to an intention to execute the

1834.—Hughes v. Turner.

power; but there is a devise of her estate in the county of Cardigan, and she had no estate in the county of Cardigan, except the estate which passed, by the republication, to the uses of Mrs. Davies' will. There is here a gift of a gold watch, pianoforte, and music books, which she could only dispose of by the execution of her power. It is argued, that she had assumed and treated these as her own property, independently of her sister's will: no such inference judicially arises. It is to be inferred, that, with the permission of the trustees, she had the personal use of these trifling articles during her life. A gift of the rest, residue and remainder of her real and personal estate, imports a gift of the rest and residue of that estate which she considered her own, and had previously partly disposed of. She had previously partly disposed of real and personal estate, over which she had a power to dispose by the will of her sister; she had plainly, therefore, the will of her sister in view, and considered the property, which passed by it, as her real and personal estate, and intended to include it in the gift of her real and personal estate. A gift of that of which a testator cannot dispose, except in execution of a power, necessarily manifests an intention to execute that power. It has been attempted to be argued, that, as to the real estate, the will of 1815 is not revoked. All wills are expressly revoked; and it is not alleged that the testatrix ever executed any other will than the will of 1815, and the three codicils. The court of delegates has determined, that, with respect to the personal estate, these \*instruments are revoked; and it is difficult to ap- [\*691]prehend how, if these instruments are revoked, they can continue to operate as to real estate. It has been argued, that there can be no revocation of a will as to land without a substitution of new uses. This is a plain error. The author of an instrument may, if he pleases, absolutely revoke it; if he intend to revoke it only for the purpose of substituting new uses, and such new uses fail, then there is no effectual intention to revoke. In this case, however, there is a substitution of new uses; and the argument, if founded, would not apply. It must be declared, that the will of 1829 is a valid execution of the power given to the testatrix by her sister, both as to real and personal estate; and that the defendant, John Jones, his heirs and executors, is, and are thereby well entitled to the residuary, real and personal estate over which the testatrix had a power of disposition by the will and codicil of Mrs. Davies.

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1835: February 24th and 25th.—The cause was reheard before Sir Charles Christopher Pepys, Master of the Rolls.

Mr. Pemberton, Mr. Barber, Mr. Treslove, Mr. Tinney, Mr.

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 1835.—Hughes v. Turner.
 

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*Spence, Mr. Richards, Mr. Gordon and Mr. Blake* in support of the petition of rehearing.

*Mr. Beames and Mr. Spurrier*, for the defendants, Sharon Turner and Alfred Turner.

*Mr. Bickersteth and Mr. Wilson* for the plaintiffs.

No additional cases were cited, and the arguments did not materially differ from those which were urged at the hearing of the cause before Sir John Leach.

[\*692]     \**April 16th.*—THE MASTER OF THE ROLLS: (a)—This was a rehearing of a decree of the late Master of the Rolls, by which he declared that the will of Elizabeth Leighton Bonsall, dated the 26th of October, 1829, operated as a good execution of a power of appointment given to her by the will of Martha Davies, and upon that ground dismissed the plaintiff's bill. The will of Martha Davies is dated the 13th of December, 1808, by which, after charging her real and personal estates with the payment of her debts, and giving several legacies, she gave the rest, residue and remainder of her real and personal estate to trustees, upon trust to pay the rents and interest thereof to her sister, Elizabeth Leighton Bonsall, for her separate use for her life; and after her decease, to pay, apply and dispose of all and singular, the said trust moneys and premises to such person and persons in such parts, shares and proportions, and in such manner and form, upon such trusts, and for such intents and purposes, and charged and chargeable in such manner and form, and subject to such powers, conditions and limitations, as the said E. L. Bonsall should, by her last will and testament in writing, or any codicil or codicils thereto, to be by her signed and published in the presence of three or more witnesses, give, devise, direct, limit, or appoint; and in default thereof, or so far as the appointment should not be made, upon trust for George Bonsall, the husband of the said Elizabeth Leighton Bonsall, his heirs, executors and administrators. The plaintiff claims through this George Bonsall, contending that this power was never executed; whereas the defendant, John Jones, insists that the power was well executed by the will of Elizabeth Leighton Bonsall, and that under such circumstances, he is, therefore, entitled

[\*693]     to the property of Martha Davies, \*as well as to all such property as properly belonged to the said Elizabeth Leighton Bonsall.

It appears by the Master's report, that after the execution of

(a) Sir C. Pepyn.

1835.—Hughes v. Turner.

this will, and in the year 1812, Martha Davies purchased an estate in Cardiganshire; and incidentally, and for the purpose only of construing the will of Elizabeth Leighton Bonsall, a question arises whether the effect of a codicil, executed by Martha Davies after this purchase, and dated the 5th of August, 1815, operated as a republication of her will, so as to pass this Cardiganshire estate.

The codicil, which was properly executed and attested, is as follows: (His Honor read the codicil.) Now this codicil does not profess to republish the will. It only revokes an annuity given by the will, and substitutes a new trustee for one named in the will who had died; and in so doing, it revokes the estates given by the will to the deceased trustee, and gives to the new trustee the same estates and powers as were by the will given to the deceased trustee, in the same manner as they were vested in him; and such new trustee was to stand in the place of the deceased trustee for the purposes of the will. Elizabeth L. Bonsall was heiress at law to Martha Davies. If, therefore, the Cardiganshire estate did not pass by Martha Davies' will, it devolved upon Elizabeth L. Bonsall as her own absolute property, and passed by her will to John Jones. So, if that estate passed by Martha Davies' will, and so became subject to the power, it would not be disposed of, unless the will of Elizabeth L. Bonsall, professing to dispose of that estate, operated as an execution of the power. But it is contended by the plaintiffs, that this estate did not pass by the will of Martha Davies, and, therefore, was not subject to the power; and that Elizabeth L. Bonsall, \*therefore, having devised it as her own by her will, no [\*694] inference arises of her intention to execute the power given to her by the will of Martha Davies.

It is, under these circumstances, most important in the first place, to decide whether the codicil of the 5th of August, 1815, operated as a republication of the will of Martha Davies, so as to pass this after-purchased estate in Cardiganshire. The late Master of the Rolls considered that the codicil did operate as a republication of the will, and that the Cardiganshire estate, therefore passed. In that opinion, I cannot concur. The case of *Bowes v. Bowes*,<sup>(a)</sup> which is directly in point, having been decided in the House of Lords, it is unnecessary to consider any other authority. In that case, a testator, having devised all his freehold and copyhold land to certain trustees upon certain trusts, afterwards purchased other lands; and by a codicil, reciting the devise to the trustees, revoked the devise, so far as it related to two of the trustees, and devised his said lands to the other trustee upon the same trusts, and declared the codicil to be part of his

(a) 2 Bos. & Pull. 500.

1835.—Hughes v. Turner.

will. It was decided that the estate purchased between the date of the will and of the codicil did not pass. In the present case, the testatrix recites the death of one of the trustees named in the will, and then revokes the estates by her will given to him, and devises to a new trustee all her estates, &c., by her will devised to the deceased trustee in the same manner as the same were vested in him, thereby placing the new trustee in the place of the deceased trustee, for the purposes of her said will. It is obvious that this codicil more entirely confines itself to the subject of the will, and more exclusively deals with the property devised by it than even the codicil in *Bowes v. Bowes*. The only [\*695] \*other part of the codicil is a revocation of an annuity given by the will; but this is clearly dealing only with that which was the subject of the will; and, as in *Monypenny v. Bristow*,<sup>(a)</sup> the taking away from the party to whom, by the will, it was given, an estate during the life of the testator's wife, and giving it to his wife, was not considered as a republication, so here the mere taking away an annuity given by the will cannot have that effect. I must, therefore, consider this point as concluded by these two cases.

I proceed, therefore, to the consideration of this case, upon the assumption that the Cardiganshire estate was not subjected to the operation of the power. It is clear that, by the will of Martha Davies, it was the duty of the trustees to convert all her property into money, and to invest the proceeds for the benefit of the parties interested. She died in October, 1815, and it appears that a gold watch and a pianoforte, and some music books, which had belonged to her, remained in the possession of Elizabeth Leighton Bonsall, at the date of Mrs. Bonsall's will in 1829; and the only ground upon the face of the will of Mrs. Bonsall, upon which it has been contended that the will is to be considered as an execution of the power given by the will of Martha Davies is, that she thereby gives "a plain gold watch, which belonged to my sister," and to another legatee her pianoforte and music books, coupled with a gift of all her furniture, clocks, watches, books, &c., the Master having reported that she had no other pianoforte or music books except what had belonged to Martha Davies. Now, it is to be observed, that over such articles she, properly speaking, never had any power. She was not [\*696] tenant for life of these particular articles \*with a power of disposing of them by will, but of the residue of the estate of which these originally formed a part. Under what circumstances she had been permitted to retain possession of them, or whether they had in part become her's, as might have been the case, does not appear. The mere fact of their having be-

(a) 2 Russ. &amp; Mylne, 117.

1835.—Hughes v. Turner.

longed to her sister does not prove that they were not her's in 1829, as the will asserts that they were. It is, therefore, not proved that she, by her will, professed to dispose of that which she could only dispose of under a power, and must, therefore, be presumed to intend to execute it, which is the principle of the cases in which it has been decided that a general gift of the subject of a power, without reference to the power, will operate as an execution of it.

But suppose it proved that she had no estate or interest in the watch, pianoforte or music books, and no right, therefore, to dispose of them, except under the power in Martha Davies' will, does it follow that the will is, therefore, to operate as an execution of the power over all the property to which it applies? The rule is, that for a general gift to operate as an execution of the power, it must refer either to the power or to the subject of it; but will referring to part of a subject, or to some of many subjects, be sufficient to make the will operate as an execution of the power as to such parts, or such subjects as are not referred to? The reverse was held in *Lewis v. Lewellyn*,<sup>(a)</sup> in which a testator had freehold and copyhold estates, subject to a power, and he had freehold estates of his own, but not copyhold, and he devised all his freehold and copyhold estates; and the devise was held to operate as an execution of the power as to the copyholds, but not as to \*the freeholds, because he [\*697] had freeholds of his own to which the terms of the devise were properly applied. So here, Mrs. Bonsall had property to which the language of her will properly applied. *Napier v. Napier*<sup>(b)</sup> proceeded upon the same principle as *Lewis v. Lewellyn*. *Walker v. Mackie*<sup>(c)</sup> does not appear to me to be reconcilable with other cases, particularly that of *Webb v. Honnor*.<sup>(d)</sup> The result, therefore, is that I feel myself compelled to come to the conclusion that the will of Mrs. Bonsall did not operate as an execution of the power of appointment given by the will of Martha Davies, and that the decree therefore, must be reversed.

I have come to this conclusion after much consideration, and with much reluctance, not only because it differs from that to which the late Master of the Rolls came, but because I fear that the intention of Mrs. Bonsall may be defeated by my decision. It appears that, by the testamentary paper in which she recites the power given by the will of Martha Davies, and professes to execute it, she conceived the Cardiganshire estate to have passed by Martha Davies' will, and to be, therefore, subject to the power. The probability, therefore, is, that, when she made the will of 1829, and disposed of the same estate, she intended also to execute the power; but this is merely conjecture. She may, in the

(a) 1 Turn. &amp; Russ. 104.

(b) 1 Sim. 28.

(c) 4 Russ. 76.

(d) 1 J. &amp; W. 352.

1834.—Kennedy v. Green.

interval, have been informed that her title to the estate was as heiress at law of Martha Davies, and not under her will. It was not contended, at the hearing, that these testamentary papers, all expressly revoked by the will of 1829, could be looked at for the purpose of putting a construction upon the will of

[\*698] 1829, upon \*the point in question. *Doe dem. Brown v.*

*Brown*, (a) proves that this point could not have been contended for with success; and although in the case of *Pulteney v. Lord Darlington*, (b) and the other cases which followed it, parol evidence was admitted to show the manner in which a testator dealt with property in order to put a construction upon the terms of his will, the inclination of the court has been rather to disapprove of the course adopted in those cases, and certainly not to extend the principle established by them. Confining myself, therefore, to the will of Mrs. Bonsall of 1829, and considering that the Cardiganshire estate did not pass by the will of Martha Davies, I cannot feel any doubt as to the result.

(a) 11 East, 441.

(b) Stated in *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529. See Reg. Lib. A. 1773, fol. 710.

#### WHARTON v. THE EARL OF DURHAM.

In this case (*supra*, p. 472) the decrees of the Vice-Chancellor and Lord Chancellor were reversed by the House of Lords on the 19th of August, 1836. The case on the appeal is reported in the third volume of Messrs. Clark and Finnelly's Reports, p. 146.

[\*699]

#### \*KENNEDY v. GREEN.

1834: 20th and 21st February, and 18th, 20th and 21st November.

Where one solicitor is employed in a mortgage transaction, he is to be considered as solicitor both for mortgagee and mortgagor, and notice to such solicitor is notice to the mortgagee; and where the solicitor was himself the author of a fraud which affected the title, and the fraud was committed under circumstances, apparent upon the face of the deed fraudulently obtained, which would have excited the suspicion of a professional man, and have led to inquiry, it was held at the rolls, first, that the mortgagee was as fully affected with notice of the actual fraud, as if the fraud had been committed by a third person, and the knowledge of it acquired by the solicitor. Secondly, that the circumstances, under which the fraud was committed, were sufficient to fix the mortgagee with constructive notice, and that if, in any mortgage or other transaction, a party does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation with respect to constructive notice, as he would have been, if he had employed a solicitor.

The decision was affirmed, upon appeal, on the second ground, the Lord Chancellor being of opinion that the mortgagee was not fixed with actual notice of the fraud, which, though known of course to his solicitor, who was the perpetrator of the fraud, it was equally certain that the solicitor would conceal.

1824.—Kennedy v. Green.

THE bill was filed by Hester Kennedy, widow, against George Green and John Bethell, the assignees of James Bethune Bostock, and against Robert Kirby; and it prayed that a deed of assignment alleged to have been executed by the plaintiff in favor of James B. Bostock, might be declared fraudulent and void, and that the premises comprised therein might be re-assigned to her; and, in case it should appear to the court that the defendant Kirby was entitled to priority over the plaintiff in respect of any assignment made to him of the said premises by James B. Bostock, that the plaintiff might be declared entitled to redeem the same.

The facts stated by the bill and proved by the evidence were, that in the year 1824, James Bethune Bostock was employed by the plaintiff, who resided at Ipswich, as her solicitor, to sell out a sum of 9,000*l.* 3 per cent. bank consolidated annuities, then standing in her name, and to look out for mortgage securities on which she might invest moneys to the amount of 9,000*l.* sterling. Bostock did, accordingly, sell out the \*stock, [\*700] which produced the sum of 8,414*l.* 1*s.*, and he received from the plaintiff the further sum of 585*l.* 19*s.*, making together the sum of 9,000*l.* sterling, which was to be invested on mortgage. Bostock was the original lessee of certain pieces of ground situate near Kennington Common, of which, on the 15th of January, 1825, he had granted to building under-leases for terms of seventy-nine years and a half, wanting ten days, respectively, one at the rent of 81*l.* per annum to Joseph White, and the other at the rent of 25*l.* per annum to Thomas Kitson, who afterwards assigned his interest in the same to White. In the same month of January, 1825, Bostock, on behalf of the plaintiff, agreed to advance to White the sum of 3,000*l.* on the security of these two leases; and by an indenture, dated the 21st of January, in that year, between White of the one part, and the plaintiff Hester Kennedy of the other part, reciting the leases made by Bostock to White and Kitson respectively, and the assignment of Kitson's lease to White, it was witnessed, that in consideration of the sum of 3,000*l.* therein expressed to be advanced to White by the plaintiff, White assigned to the plaintiff, her executors, administrators and assigns, the respective pieces or parcels of ground, messuages and premises comprised in the two indentures of lease, subject to redemption on repayment of the 3,000*l.*, with interest for the same at 5 per cent.

In the month of March, 1825, Bostock wrote a letter to the plaintiff, stating that a mortgage for the sum of 3,000*l.* had been completed; and in the month of April following he wrote another letter to the plaintiff, purporting to contain an account of the application of the whole sum of 9,000*l.*, and stating that the additional income arising from the investment would be up-

1834.—Kennedy v. Green.

wards of 160*l.* per annum more than she had previously received; that the securities were most ample, and that [\*701] \*the strictest punctuality would be observed in the payment of the interest.

The plaintiff received from Bostock the interest upon the sum advanced to White, and upon the other sums alleged to be invested on mortgage, until the month of March, 1828.

In that month Bostock wrote a letter to the plaintiff, in which he stated that he should in a few days be near Ipswich, the place of her residence, and that he would take the opportunity of paying her a visit. Bostock, shortly afterwards, arrived at the house of the plaintiff; and after partaking of breakfast with the plaintiff and some friends who were staying at her house, he stated that he had some business to transact with the plaintiff; and, after mentioning that one of the mortgagors to whom part of the plaintiff's money had been advanced was rather irregular in paying his interest, he produced a parchment writing, which he said it was necessary for the plaintiff to sign in order to make the principal and interest in such mortgage more secure, and to compel the mortgagor, under a heavy penalty, to be punctual in the payment of the interest as it became due. The plaintiff, without reading or examining the instrument presented to her, signed her name in compliance with Bostock's request, in the places pointed out by Bostock; and Captain James M'Farland and his wife, who were the friends of the plaintiff staying with her in her house, also wrote their names, as attesting witnesses, in the parts of the instrument pointed out by Bostock.

The instrument, to which the execution of the plaintiff was thus obtained, purported to be a deed of assignment, [\*702] dated the 26th of March, 1828, whereby, after \*reciting the indentures of lease by Bostock to White and Kitson, and the assignment by Kitson to White, and the assignment by way of mortgage of the 21st of January, 1825, by White to the plaintiff, and further reciting that Bostock was about to become the purchaser of the premises comprised in the mortgage to the plaintiff, and that there was then due and owing to her for principal and interest the sum of 3,046*l.* 17*s.*, and that Bostock was desirous of purchasing the mortgage, it was witnessed that, in consideration of the sum of 3,046*l.* 17*s.* therein expressed to be paid to the plaintiff by Bostock, the plaintiff assigned the mortgaged premises, and all the estate, right, title and term of years of her, the plaintiff, in the said mortgaged premises to Bostock, his executors, administrators and assigns, to hold the same for the residue of the terms of years granted by the indentures of lease respectively. And on the back of the instrument was indorsed a receipt, to which were annexed the signature of the plaintiff and the attestation of Captain M'Farland and his wife,



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purporting to be an acknowledgment by the plaintiff of her having received from Bostock the sum of 3,046*l.* 17*s.* The receipt for the consideration money was not, as usual, written by the stationer, but by Bostock; nor was it in the usual place, which is at the upper extremity of the left hand square formed by the fold of the deed, but much lower down, so that there was a space reserved for writing the receipt, if it were not written before the plaintiff signed her name; or if written before the plaintiff wrote her name in that part of the parchment, the deed might have been presented to her in a folded form, so that she would not have observed the receipt.

In the month of February, 1827, a commission of bankrupt was issued against White, the sub-lessee and mortgagor; \*and Bostock afterwards contracted with the as- [\*703] signees, appointed under White's commission, for the purchase of the bankrupt's equity of redemption, and that equity of redemption was conveyed to Bostock by a deed, dated the 18th of April, 1828, which contained a recital that the plaintiff's mortgage had been paid off by Bostock, and that she had by an indenture, dated the 26th of March, 1828, in consideration of the principal and interest then due to her having been paid by Bostock, assigned the premises to Bostock for the residue of the term granted by the two indentures of leases therein recited.

Some time afterwards Bostock applied to the defendant, Joseph Kirby, who was his father in law, to advance to him the sum of 2,000*l.* on the security of the leasehold premises; and by an indenture, dated the 7th of August, 1829, and made between Bostock of the one part, and the defendant, Joseph Kirby, of the other part, after reciting the lease by Bostock to White, and the lease by Bostock to Kitson, and further reciting that by divers acts and assurances in the law, Bostock had become, and then was absolutely entitled to all the residue of the several terms granted by the said therein recited indentures of lease, and that the defendant, Kirby, had agreed to advance to Bostock the sum of 2,000*l.* on the terms and security thereafter expressed, it was witnessed that, in consideration of 2,000*l.* paid to Bostock by the defendant, Kirby, Bostock assigned to the defendant, Kirby, his executors, administrators and assigns, all the premises comprised in the said recited indentures of lease, and all the estate, term, &c., of Bostock in the same, to hold the same to the defendant, Kirby, his executors, &c., for the residue of the unexpired terms, upon trust to secure to the defendant, Kirby, his executors, &c., the payment by Bostock, his heirs, executors, &c., of the 2,000*l.* and interest at 5 per \*cent. And the deed gave [\*704] a power of sale to the defendant, Kirby, his executors, &c., in case of default in payment of the principal sum at the time appointed for the payment of the same, and also a power to

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raise any sum by mortgage, and afterwards to sell the leasehold premises, if Kirby, his executors, &c., should think fit.

In the month of June, 1831, default having been made in payment to the plaintiff of the interest of the 3,000*l.* advanced to White, the plaintiff called upon Bostock to send to her the title deeds relating to White's mortgage, and to procure the repayment of the mortgage money. Bostock sent a letter in answer to the plaintiff, stating that the arrear of interest would be shortly paid, and that the title deeds would be sent to her as soon as a transfer of the mortgage was effected.

On the 9th of June, 1831, a fiat in bankruptcy was issued against Bostock, to which he did not surrender, having in fact absconded; and he was duly declared a bankrupt, and the defendants, Green and Bethell were appointed his assignees.

The bill was filed on the 10th of July, 1832: it charged that no debt was really due from Bostock to the defendant, Kirby, his father in law, but that the assignment to Kirby was executed fraudulently, and with a view to defeat the claim of the plaintiff; and that, at the time when such assignment was executed, Kirby or his solicitor had notice of the previous assignment of the mortgaged premises to the plaintiff, and knew that the sum of 3,000*l.* and interest was still due to the plaintiff.

The defendant, Kirby, by his answer, stated that Bostock, when he applied to him for the loan of 2,000*l.* upon the [\*705] security of the leasehold premises in question, \*delivered over to him the title deeds relating thereto; and that he, the defendant, felt himself competent, from his own knowledge and experience in such transactions, to examine the same and make himself master of the title without any professional assistance; and that, if he had found anything which he could not comprehend, he should have applied to Mr. Kearsey, whom he considered as his solicitor, and whom he had employed before he became acquainted with his son in law, Bostock; that he, the defendant, had been in possession of the title deeds from August, 1829, until May, 1832, without any claim being made on the part of the plaintiff, and without any suspicion of the plaintiff or any other person having any claim in opposition to his rights. The defendant denied that he had employed Bostock as his solicitor; and he stated that, on default of payment by Bostock of the sum of 2,000*l.* at the time appointed in the indenture of the 7th of August, 1829, he had caused notice to be served upon Bostock, previous to the filing of the plaintiff's bill, requiring him to pay the principal money and interest due on the defendant's security, or that he, the defendant, should proceed to a sale; but that no sale had been made, or was intended to be made; and the defendant insisted that he was entitled to hold the premises comprised in his mortgage, as a security for the

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repayment of the principal sum and interest due, in priority to the plaintiff. The defendant did not know whether Bostock was ever let into possession of the premises in question, or into the receipt of the rents and profits thereof, but was informed by Bostock that he was in possession. The defendant denied all knowledge of, or participation in the fraud alleged to have been committed by Bostock, and he insisted that the receipt on the back of the deed was in the usual form; and he stated that he believed that the whole width of the upper part of the deed, comprising the first \*and second folds, was exposed to [\*706] the view of the plaintiff and witnesses at the time the receipt was signed and attested, inasmuch as parts of letters composing the words written by the plaintiff and the witnesses were in the upper division of the parchment made by the fold; and other parts of the same letters in the lower division.

It appeared by the evidence of the law stationer, by whose assistant the indenture of the 26th of March, 1828, was engrossed, that it is the usual practice for law stationers to indorse receipts for the consideration money expressed in the deed at the upper part of the left hand corner of the back of the engrossment, unless instructions were given to the contrary; and that this indorsement was not made on the deed in question before it was returned to the person for whom it was engrossed. Several experienced solicitors were examined, who deposed that the unusual circumstances attending the receipt, and the form of the deed itself, would have so much excited their suspicion, that they would not have suffered any client of theirs to become a mortgagee under Bostock without further inquiry. The deed purported to be an assignment of a mortgage, and bore only a common deed stamp; but, instead of assigning the mortgage debt, it assigned the premises charged with the debt; and it did not assign the mortgage deed, or contain the usual powers to the assignee to recover and receive the debt. It, moreover, recited that Bostock had agreed to purchase the mortgaged premises of Mrs. Kennedy; and if it had been really a purchase either of the mortgage debt, or of the mortgaged premises, it would have required an *ad valorem* stamp.

The questions raised in the cause were, first, whether, supposing the legal estate of the mortgaged premises to be vested in the defendant, Kirby, Bostock was to be \*con- [\*707] sidered as the solicitor of Kirby, and Kirby, therefore, affected with actual notice of the fraud committed upon the plaintiff; secondly, whether, if Kirby had not actual notice, the unusual circumstances attending the receipt, and the unusual and irregular contents of the deed, did not amount to implied notice of the fraud.

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Mr. *Pemberton* and Mr. *Girdlestone*, jun., for the plaintiff:—In the transaction between Bostock and the defendant Kirby, Bostock was the sole solicitor employed by the defendant; and as notice to the solicitor is notice to the client, and Bostock was the perpetrator of the fraud, the defendant, Kirby, however morally innocent of the fraud, is of course affected with actual notice of it, and liable to the consequential pecuniary loss. But, even if Bostock is not to be considered as the solicitor of Kirby, and Kirby is not, therefore, affected with all the knowledge of Bostock, still the circumstances of this transaction are abundantly sufficient to fix Kirby with implied notice of the fraud. Kirby admitted that he did not know, and took no means to ascertain whether Bostock was, as he represented himself to be, in possession of the premises, and in the receipt of the rents and profits. In a late case of *Popple v. Prideaux*, this court, following the principle laid down by Lord Eldon in *Daniels v. Davison*,<sup>(a)</sup> held, that a purchaser for valuable consideration without actual notice, who dealt with a person out of possession, and did not use all the means which a person of due diligence might be expected to use, in order to ascertain the state of the title, was to be considered as a purchaser with implied notice. Not only was the fact of Bostock being out of possession a circumstance which Kirby was bound to ascertain, and which, \*when ascertained, was sufficient of itself to put him upon further inquiry; but the unusual circumstances connected with the receipt, the contents of the deed itself, and the absence of a proper stamp, were calculated to excite suspicion, and would, as it is sworn by several unexceptionable witnesses, have excited suspicion in the minds of any persons of competent professional skill, and have induced them to decline treating with Bostock, on behalf of any client, until further inquiry had been made. If Kirby did not employ Bostock as his solicitor, but relied upon his own supposed competence to investigate the title, and judge for himself as to the validity of the proposed security, this, in itself, betrays a want of that prudence and caution which ought to regulate the conduct of men in transactions of business; and will, upon the principle acted upon by the court in *Popple v. Prideaux*, fix him with constructive notice. Either Bostock was his solicitor, and he is, so far as actual notice of the fraud is concerned, legally identified with Bostock, or he had no solicitor, and if he thought proper to act for himself without resorting to professional aid, the consequences of his negligence; or of his confidence in his own skill, which in its foundation and in its result was equivalent to negligence, are not to be visited upon an innocent third party. If the effect of the mesne assignments, one of which was effected by an

<sup>(a)</sup> 16 Ves. 249.

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act of gross fraud, was to vest the legal estate in Kirby, then Kirby held that legal estate subject to the equity of the plaintiff to be relieved against the fraud.

THE MASTER OF THE ROLLS:—I am of opinion that the effect of these transactions was to vest the legal estate in the defendant, Kirby. Bostock, the original lessee, made two under-leases, the interest in which afterwards became vested in White; White assigned his interest in the terms by way of mortgage to the plaintiff, \*who thus acquired the legal estate, [\*709] which she afterwards assigned to Bostock. The assignees of White assigned the equity of redemption to Bostock, the original lessee; and there was thus a surrender and merger of the sub-leases, and Bostock acquired a complete title at law. I am of opinion that the deed under which Kirby claims was not an assignment of the two terms vested in the plaintiff by White's mortgage, but that it created a new mortgage.]

Mr. Bickersteth, Mr. Wigram and Mr. Hughes *contra*:—It cannot be disputed that a gross fraud has been committed; and the question is, upon which of two parties who, in a moral sense, are entirely innocent, the consequences of that fraud shall be visited. On the part of the defendant, the transaction between him and Bostock was a fair and *bona fide* transaction; and it is to be borne in mind, that whatever the consequences of the fraud may be, and on whomsoever they are to light, those consequences are the result of the act of the plaintiff. Had it not been for her misplaced confidence in Bostock, the 2,000*l.* would never have been advanced by Kirby. She was in possession of a good and valid security; and it was to render her situation, as she conceived, more secure, that she was induced to do the act which enabled Bostock to perpetrate the fraud. Previously to the execution of the assignment to Bostock by the plaintiff, Bostock had entered into a contract to purchase the equity of redemption from White's assignees. Bostock was also a mortgagee of the leasehold premises, and the terms of his contract with the assignees were to pay off the plaintiff's mortgage, apply part of the purchase money to the satisfaction of his own mortgage, and stand as a creditor to White's estate for the surplus. \*There was [\*710] nothing in this transaction, as it appears on the face of the deed, to excite suspicion in the defendant, Kirby, or in any person less disposed than Kirby was, at the time he accepted the security, to repose confidence in Bostock. Kirby relied upon his own knowledge of business, and abstained from employing a solicitor; and it would be carrying the doctrine of constructive notice farther than it has ever yet been attempted to carry it, if it were held that a man could not act for himself in any transac-

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tion of business, except at the peril of being fixed with notice, if he did not possess all the knowledge of the most experienced professional adviser. It is not pretended that Kirby had any direct knowledge of the fraud; and the only question is, whether he had a knowledge of such circumstances as ought to have put him upon inquiry, and might, if he had followed out the inquiry, have led to a discovery of the fraud. It is said that the receipt is in an unusual place, and that a space was fraudulently reserved on which the receipt was written, after the plaintiff and the witnesses signed their names; but it appears that their names are so written on the crease formed by the fold of the parchment, that the upper part of the parchment must necessarily have been exposed to the view of the persons who wrote the signatures. . None of the alleged irregularities in the form of the deed are of a nature that would have excited suspicion, had it not been for the circumstances which have naturally led the witnesses to scan every part of this deed with extraordinary vigilance. Unless Kirby had doubted the integrity of his son in law, Bostock, of which he distinctly states that he entertained no doubt until he was informed of an application to strike him off the Rolls in the month of May, 1832, there was nothing to raise suspicion. As to the argument that Kirby is to be fixed with actual notice of the fraud, because notice to the solicitor is notice to [\*711] the client, \*that rule applies only to the same transaction in which the solicitor and client were engaged, and not to prior transactions in which the solicitor was engaged; for, if it were otherwise, no one could, without risk, employ an eminent professional adviser, and the greater the eminence of that adviser, and the more extensive his practice, the greater would be the danger of the party employing him.

Mr. *Bethell* for the assignees.

Mr. *Pemberton* in reply.

THE MASTER OF THE ROLLS:—By this bill Mrs. Kennedy complains that, by her great confidence in Bostock, and by the gross abuse of that confidence on his part, she was induced to assign to him, not her actual right and interest in the mortgage, but her legal or apparent title. This legal and apparent title Bostock afterwards assigned by way of mortgage to the defendant Kirby; and the bill asserts that Mr. Kirby, at the time he took this legal or apparent title, contrary to the actual right and interest of Mrs. Kennedy, had either actual notice of the fraud committed by Bostock, or, if not actual notice of the fraud, had notice of circumstances which imposed upon him the necessity of inquiry, which, with due care and diligence, would have led

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to a full knowledge of the fraud; and the question before the court is, whether the assertions thus made in the bill have or have not been established in the progress of the cause; and I am of opinion that they have been completely established.

Upon the question of actual notice, it must be admitted that notice to the agent or solicitor is notice to the principal. In all mortgage transactions, the solicitor \*of the mort- [\*712] gagee is the person employed in the preparation of the security; and it is fit that it should be so, because it is his money that is advanced, and it is his interest that is to be protected. The mortgagee here was the father in law of the mortgagor, and being the father in law of the mortgagor, he employs no other solicitor than his son in law Bostock, who was himself a solicitor. Having, in the common course of business, been in the habit of employing a different solicitor, in this transaction he entrusts Bostock as his sole solicitor, and Bostock must be considered as the solicitor of the mortgagee, as well as acting for himself, the mortgagor. If Bostock is to be considered as the solicitor of the mortgagee, it is impossible to deny notice. It is said, that this is a case similar to those in which the court has declared that a client is not to be affected by notice of a solicitor in a prior transaction. This case has no analogy to that principle. Bostock is here to be considered as if, in this transaction, notice had been given to him by a third person of the fraud committed upon Mrs. Kennedy. If Bostock, acting both for the mortgagee and mortgagor, had received notice of a fraud thus committed upon Mrs. Kennedy by a third person, it would plainly have been notice to Kirby; and Bostock being in full possession of knowledge of the fraud, because he was himself the author of it, Kirby is as much affected by his solicitor's knowledge of the fraud as if the solicitor had acquired that knowledge from a third person. Upon that ground alone, if there were no other, I should consider the defendant, Kirby, as affected with full notice of the actual fraud.

There is, however, another ground. I have stated that the question is, not only whether there is actual notice, but whether there is a knowledge of those circumstances, which, if reasonable diligence had been \*used, would have led to [\*713] a knowledge of the fraud. I am of opinion, here, that the defendant, Kirby, is fixed with notice of those circumstances which would have led to a knowledge of the fraud. It is said that Kirby employed no solicitor, and that he, therefore, is not to be fixed with those circumstances apparent upon the deeds, which would have led other persons to indulge suspicion. Such a proposition is not to be entertained in any court of justice. A man is not to avoid the consequences of a want of due diligence, by stating that he has neglected those means, which would

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have been required, if he had used reasonable caution. If the defendant, Kirby, not considering Bostock as his solicitor, had employed another solicitor, he would have been fixed with implied notice from the circumstances arising from the deeds in question; and he cannot protect himself from such implied notice, by not having used the ordinary caution of employing a solicitor to protect his interest. The perusal of the deeds would have led every man of business, to the conclusion that there was something irregular; and the nature of this transaction would, therefore, have induced an inquiry, which, if pursued with reasonable diligence, would have led, by reference to Mrs. Kennedy, the plaintiff, to a full knowledge of the circumstances under which she had been induced to assign her interest to Bostock.

The defendant, Kirby, must, therefore assign his mortgage to the plaintiff, Mrs. Kennedy, and must pay the costs of the suit.

*November 18th and 20th.*—The cause was reheard before the Lord Chancellor. The arguments at the rehearing were similar to those urged at the hearing in the court below.

[\*714]     \*The *Solicitor-General*, Sir William Horne and Mr. Girdlestone, jun., in support of the decree.

Sir Edward Sugden, Mr. Wigram and Mr. Hughes *contra*.

Mr. Bethell for the assignees of Bostock.

*November 21st.*—THE LORD CHANCELLOR:—This case, from the peculiar circumstances of fraud which belong to it, and from the hardship in which the court is placed, of throwing the consequences of the injury worked by the guilt of the wrongdoer, upon one of two equally innocent persons, has naturally excited considerable interest both below and here. Much has been said of the late Master of the Rolls' habitual dislike of fraudulent transactions, a feeling which I hope and trust his Honor shared with all other judges, as he certainly did with all good and honorable men. But it seems to be supposed that he carried this feeling so far as to let it affect his judgment, and make him draw false conclusions from facts—nay, for, unless this further step is made, it explains nothing here—that his indignation against wrongdoers caused him to conceive like feelings against the innocent, and, in search of a victim, because a wrong had been done, involve the blameless with the guilty, and even punish the victims for the injury which had been done by the wicked against themselves. In such feelings I hope and trust no judge ever does indulge. I am confident the late Master of the Rolls did not. I know that, were I to bring such to the decision of this



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case, I should be working the grossest and most unpardonable injustice. Mrs. Kennedy is innocent; Mr. Kirby is innocent; both are dupes and \*victims; the connection by [\*715] marriage between the latter and the wrongdoer is only an additional misfortune, and surely no fault; and the only question is, which of the two in this court, and as far as equitable relief extends, shall suffer the consequences of the crime. If either has been guilty of negligence, that, though blameless, must be recorded against them and affect their claims; and that must be taken into account with all the rest of the facts in the case.

These are few and simple, nor are they at all in dispute between the parties.

James Bethune Bostock was the solicitor of the plaintiff, Mrs. Hester Kennedy, an elderly lady, but in the full enjoyment of her faculties; and he was employed by her with a more than ordinary share of confidence reposed in him. This he grossly abused. Finding it necessary, for the purpose of enabling him to obtain money from Mr. Kirby, the defendant, his father in law, to get from her an assignment of a mortgage for above \$,000*l.*, he caused a deed to be prepared, and employed a stationer, to whom he was apparently unknown, for he paid ready money for the engrossment, and received it back without the title of the instrument indorsed on the usual place, and in the accustomed engrossing hand. He then carried it to his client, and obtained her signature and seal, and execution on the face of the deed, at the foot, in the ordinary way. Captain and Mrs. M'Farland subscribed on the back the usual attestations as witnesses; and there appears further on the back a very extraordinary receipt for the whole money, signed also by Hester Kennedy, and witnessed by the M'Farlands.

\*In all deeds the receipt is put on the upper of the [\*716] squares, formed by folding the parchment; or, if the deed is executed before the folding, it is still at the top, in order to prevent any fraudulent addition being made after the party shall have signed the receipt. But here the receipt is written not only far down the skin, it is written at the very bottom of the upper left hand square, so that there might have been anything prefixed, and then the word "further" added, to connect it with what follows, and what is signed.

Again, the name is always signed immediately after the receipt, and on the same square, and above the fold. But here, for the first time, we see the receipt on one square, and the name on the one below, so that no one can look at the instrument without perceiving that the party might have signed it when folded up, and when no part of the receipt had been written on the skin. I pass over the other lesser singularities of part of the receipt, and

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part of the name being written laterally on one square, and part of each on another.

Now it is said that all this is not evidence sufficient to convict Bostock of fraud, and that it does not raise more than a suspicion; that it is only consistent with the supposition of fraud, but that it does not prove in what manner Mrs. Kennedy's signature was obtained. For all that the subscribing witnesses swear is, that they have no knowledge or recollection of any receipt, or anything being written above the place where Mrs. Kennedy and themselves signed what is now the receipt. To one very material circumstance, however, they both distinctly swear; that no money passed, and that nothing whatever was said about any money or receipt of anything on the occasion. This is carefully to be kept in view.

[\*717] \*But we are now to look at what afterwards happened, and that leaves no doubt at all upon the transaction. Bostock took the deed away with him, and retained it in his possession until he handed it over to Mr. Kirby, when he applied to Mr. Kirby for the loan of 2,000*l.*, upon the security of the leasehold property.

That Bostock was employed in this transaction by Mr. Kirby as his solicitor, and in his professional capacity, no one can affect to doubt. Mr. Kirby was in trade, and did not trust his own ignorance of law writings and inexperience in conveyancing. Bostock was acting, therefore, as his professional man; his agent to do, and his adviser to counsel. He then obtains the 2,000*l.* from Mr. Kirby, on the assignment of the mortgage, and not a farthing of this does he pay over to his other client, Mrs. Kennedy, whose receipt he had obtained. He employs it in his own speculations, or to supply other of his necessities; and his practices being discovered—his conduct brought before the Court of King's Bench—his affairs plunged into confusion and bankruptcy—he did not meet the charges, nor face his creditors, but absconded, and went abroad.

This throws a broad and clear light upon all the story, which the inspection of the deed tells, making quite plain with what view and in what way the signature of Mrs. Kennedy was gotten, and showing as clearly that he made her sign the receipt without seeing what she was setting her hand to, by a statement that she was only completing her execution of the mortgage deed itself, or doing an act by which she would secure the regular payment of the interest upon her mortgage money. To say

that the deed only raises suspicion after this, is wholly impossible. The after acting clears all doubt away, and we see the whole transaction in its proper and its hideous colors.

How much worse than ordinary breaches of trust, committed

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under the pressure of embarrassment, this conduct of Bostock's was, need not be noted in passing. The man of business who diverts to his own use his client's money entrusted to his hands, and while his client employs him in some sort as a banker, is far from blameless, though that peculiar kind of employment, and the nature of that deposit, and the pressure of his unforeseen necessities may greatly extenuate his fault. But here was a person who actively contrived a fraud to delude both his employers; took advantage of one of those clients to obtain an instrument by getting a signature to one thing, whilst he made the party suppose she was signing another; imposed on his other client and relative by giving him, for a large sum, an instrument at law not worth a farthing, if the truth came out, and then applied the money so obtained to his own uses—conduct approaching, in a moral view, nearer than by any assignable distance, to forgery.

But the degree of Bostock's guilt, or the complexion of his fraud—be it more aggravated, be it less—is immaterial to the decision of the present question. That there was fraud, is abundantly clear; such fraud as, if proved to a court and jury, would have rebutted all claims at law upon this instrument, and sustained the plea of *non est factum* by Mrs. Kennedy, pleaded in bar. I have no kind of doubt that such would be the case, and this the result of an action or of an issue, which I therefore hold it superfluous to direct.

But has not Mrs. Kennedy also a right to the equitable relief of this court? That depends upon a defence \*com- [\*719] petent to Mr. Kirby here, though immaterial elsewhere. He says he was a purchaser for value, and without notice; and the question thus raised is, had he notice or not? Of actual knowledge there is no question. No evidence touches Mr. Kirby, nor is he charged in any way with knowing or partaking in the fraud of Bostock. But it is said that neither had he any constructive notice.

The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge.

In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not. Under one or other of

these heads, perhaps under both, comes the other principle, which is quite undeniable, that whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation.

These principles are so plain that they need not be supported by reference to authority, and they dispose of the present question.

[\*720] \*Bostock was acting as Mr. Kirby's solicitor in the transaction, and although, generally speaking, the knowledge obtained by a man's attorney or agent fixes himself, if obtained while so employed, and on the same business (for I do not at all differ from *Mountford v. Scott*,<sup>(a)</sup> *Hiern v. Mill*,<sup>(b)</sup> and the other cases,) yet it cannot here be said that Mr. Kirby is fixed with all which Bostock knew. For the fraud, practiced by Bostock upon Mr. Kirby himself, was of course concealed from him; and so we may say would certainly be that other fraud which he had practiced on Mrs. Kennedy. Indeed that was only another part of the same fraud, another act of the same plot; and, therefore, I think we cannot, on this account alone, fix his client, Mr. Kirby, any more than his employer Mrs. Kennedy, with the knowledge of his criminal proceedings. We must lay out of our view all the knowledge, the actual and full knowledge he had of his own fraud, and are not to hold Mr. Kirby as cognisant—I mean of course cognisant in law and constructively—of that, merely because his solicitor himself, the contriver, the actor and the gainer of the transaction, knew it all well.

But suppose him not the actor, and only regard him as an attorney wholly unconcerned in the plot, and employed by Mr. Kirby, and not only innocent of the whole affair, but wholly ignorant of it. This supposition is as strong as we can make in Mr. Kirby's favor, gets rid of all the last argument I have adverted to, and meets the objection that the plotter of the fraud never could communicate it to one of its victims; and that to charge the latter with his guilty knowledge would be unjust. I say still, with all this deduction and all this supposition, Mr.

Kirby is fixed. For Bostock, had he been wholly free [\*721] from the guilty knowledge, and only \*employed as a solicitor to act for and advise Mr. Kirby, must, on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed. The contents of the instrument itself were perhaps calculated to rouse suspicion and prompt inquiry. But the back of the deed was checkered all over with suspicious appearances. The title of the deed, not

(a) 3 Mad. 34.

(b) 13 Ves. 114.

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1834.—Kennedy v. Green.

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in the engrossing hand, but written in a somewhat slovenly way, and with the words of the title of different sizes, beget a suspicion of hurry and imperfection in the preparation of the instrument. When does a stationer ever send such a blank indenture out of his office, unless when pressed for singular dispatch? Then the receipt written across one fold into a second square sideways, and the signature in like manner running into the second square. But, above all, the receipt removed far from the top, and leaving such a space as might, by the holder of the deed, supposing that space to have been left in blank, have been filled up in any manner he choose. This was, at once, a circumstance to excite the greatest, the most jealous suspicion. Had a check been originally written with an inch of blank to the left hand of the sum, would not all who saw it start at the risk run by the maker, and would not the maker, on his attention being drawn to it, nay, even the holder, take the precaution of drawing a line or two over the blank? But suppose a banker had discounted a check with a sum as "one hundred" interlined, would any judge direct any jury to let that banker recover against the maker, though full value had by him the banker been paid for it? All the cases have decided the contrary, and held that every unusual circumstance is a ground of suspicion, and prescribes inquiry; and I hold the receipt written here in a way to enable any person to commit a gross fraud—a way for that reason never adopted—was abundant ground for \*suspicion, [\*722] and demanded inquiry and explanation. When to this we add the further unusual circumstance of the party's name being written on the square below, and with a fold between it and the receipt, so that it was most probably written when the receipt was folded down, assuredly no one can hesitate in pronouncing that whoever, especially a man of business, looked at the deed, must have conceived such suspicions as to call for inquiry; and if he had inquired, Mrs. Kennedy would have told him that she knew of no receipt, and had received no money, and that the whole, consequently, was a fraud. Thus, taking Bostock to be merely an ordinary solicitor, employed by Mr. Kirby in settling this transaction for him, the deed was such as at once gave him notice that all was not right, and put him upon inquiring. That is notice to him and his employer of whatever the inquiry would have disclosed. Can it make the least difference, that in this case Bostock abstained from making the inquiry, because he already knew the whole fraud, the tissue of which his own hands had woven? Can it alter the fact, or displace the point, on which the whole turns, of the existence of suspicious appearances, and the certainty that the inquiry, instigated by them, must have disclosed the truth, that this truth was already within the full knowledge of the person employed, and whom we are supposing

1834.—Kennedy v. Green.

to have examined the deed for his client? A difference it may make, but the difference is against, and not in favor of the defendant's argument.

Can it, again, make any difference in the case we are supposing of a solicitor employed to examine a deed, and having ground to suspect, and, suspecting, beside being bound to inquire as to its fraudulent concoction, that here, being so employed, he was himself the fabricator of the whole fraud, and only did [\*723] not suspect, \*because he knew for certain the whole plot? A difference it may make, but that difference is against, and not in favor of the defendant's argument.

I therefore consider the case of constructive notice as here abundantly made out, and I affirm the decree of the Master of the Rolls; but I think, as the plaintiff resorts to this court for relief against her own handwriting, we must recollect that she, by simply looking at the parchment which she signed without seeing what it contained, might possibly have discomfited the wicked man who was engaged in circumventing her; and I do not, therefore, think she ought to have had her costs below against the other party, to whom no *laches* at all is imputable personally, who also is the defendant, and does not come to ask anything of the court. The decree must, therefore, be affirmed with this alteration as to the costs, and for the same reason, I do not give her the costs of the appeal. The deposit must be returned.

At the close of this judgment, the LORD CHANCELLOR delivered the following address:—

"I have now disposed of all the cases that have been heard before me up to the last; and it is with great satisfaction that I quit this court without putting any one party to the expense and delay of having his cause retried before another judge. I have equal satisfaction in observing that (besides a cause which stands over by consent for common law judges, and under the application of the party) there are only two cases which remain to be heard, which were set down before the last long vacation. As I

have no right to press the parties closer than this, it was [\*724] my intention, if I had remained \*here, to adjourn the court on the last day of term, early next week, until the 11th of January, the last day of next term, as I was obliged to do in the month of June last, for a like reason, the business being all disposed of. Thus, I have the great satisfaction of reflecting that this court, represented by its enemies as the temple of discord, delay and expense, has been twice closed within the space of five months; and I ascribe this singular felicity of the times, to the tried ability and most indefatigable industry of my most learned and excellent coadjutors, the present Vice-Chancellor,

and my lamented friend the late Master of the Rolls, and in part also, to the labor and talent of the bar. That the same good fortune will follow my successor, I confidently expect; for he, too, will have the aid of his Honor, the Vice-Chancellor, and he will have the further aid of the present Master of the Rolls, whose high accomplishments as a lawyer—whose consummate fitness for the judicial office, render his elevation at once, of the greatest benefit to the public, and are my own best title to the gratitude of the profession.

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On the same day, Lord Brougham resigned the Great Seal, which was thereupon delivered by his Majesty to Lord Lyndhurst, who was sworn into office, and took his seat in the Lord Chancellor's Court at Westminster, on the following day.





AN

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TO THE

## PRINCIPAL MATTERS.

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### A

#### ACCOUNT.

Where the lord of a manor, who claims against the tenants the right of property in the mines within the manor, has stood by for a long period and allowed the tenants, without objection, to work the mines and to expend large sums of money upon their mining operations, the court will not assist him by making a decree for an injunction or account against the tenants, but will leave him to his legal remedy.

Distinction between the cases in which the right to an account is incident to the injunction, and those in which it is independent of that relief.

Peculiarity of the case of mines in this respect.

The right to an account, even in the case of mines, may be lost by *laches*.  
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Gift by deed, subject to a power of appointment by the donor; from a person upwards of ninety years of age to a confidential agent, who had for many years been in habits of friendship with the

donor, without the intervention of a disinterested third person, the solicitor who drew the deed being the solicitor of the person who took the benefit under it, declared void at the Rolls; but supported, under all the circumstances, upon appeal.  
*Hunter v. Atkins*, 113

#### AGREEMENT.

1. Where, in an agreement for the lease of a house to be granted by defendants to the plaintiff, it was stipulated that the lease should contain the usual covenants between landlord and tenant, and that the house should not be converted into a school, it is immaterial whether the plaintiff had or had not notice that the defendants derived their title under a lease from another person, because the agreement amounts to a representation on the part of the defendants, that they were at liberty to grant a lease conformably to the terms of the agreement. *Van v. Corpe*, 296

2. Where a parol agreement, varying the terms of the written agreement, is set up by the defendants in a suit for specific performance, and supported by evidence affording a presumption or suspicion of its existence, an inquiry will be directed.  
*Ibid.*

3. An agreement in writing for the sale of a house, did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement. The court

held the agreement sufficiently certain, if it could be ascertained by an inquiry before the Master, that the deeds in the possession of the person named referred to the house in question. *Owen v. Thomas*, 358

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#### ALIEN.

An alien resident in England, purchased an equitable interest in freehold lands, and also a lease for a long term of years, and afterwards obtained letters of denization which, in terms, conferred upon him the power not only of acquiring lands in future, but of retaining and enjoying all lands which he had theretofore acquired: Held, that he had power to devise the freehold and chattel interest in land which he had purchased previously to the letters of denization.

By his will he directed all his property to be sold and converted into money, and after charging this mixed fund with his debts and legacies, gave the residue to aliens resident abroad, one of whom was his heir at law: Held, that the rule which is applicable to charitable bequests was applicable in such a case; that the interest in land and the pure personal estate must respectively be valued, and bear their proportions of the debts and legacies; and that the residue of the interest in land belonged to the crown, and the residue of the pure personal estate to the aliens. *Fourdrin v. Gowdey*, 383

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1. The court will not order the payment of a fund in court, to which petitioners are declared to be entitled by an award made under an order of reference, until the award has been made a rule of court. *Salmon v. Osborn*, 429

2. Where it was one of the terms of an agreement to refer disputes to arbitration, that the submission might be made a rule of a court of law at the option of either party; and, a bill having been filed to set aside the award, it appeared by the answer of the defendant that the submission had been made a rule of the Court of King's Bench by the defendant subsequently to the filing of the bill, the com-

mon injunction which had been obtained by the plaintiff was, upon appeal, dissolved, the Lord Chancellor holding that the Court of Chancery had no jurisdiction to relieve against the award. *Nichols v. Roe*, 431

#### B

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#### C

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Where a testator directs that his debts and funeral expenses are to be paid by his executors, it is *prima facie* to be considered that he means the payment to be made by them out of the funds which come to their hands as executors. Whether he intends that all property, which he gives to his executors, shall be subject to the payment of his debts and legacies, must be gathered from the whole will. *Wasse v. Heslington*, 495

##### CHARITY.

1. Length of possession will not prevail against charitable trusts, where the land was purchased with notice of the trusts. *Attorney-General v. Christ's Hospital*, 341

2. A testator, who gave a legacy for charitable purposes to be executed in a foreign country, named as one of the trustees of the charity an officer created by act of Parliament, describing him by his office and not by his name. The act of Parliament having been repealed, and the office abolished, the court referred it to the Master to approve of a proper person to be a trustee in his stead. *Attorney-General v. Stephens*, 347

3. The heir is excluded from the increased rent of an estate devised to a charity, if in express terms the whole profits of the estate are devised to charitable uses, or if the charitable uses mentioned in the will exhaust the whole actual rent at the time of the devise. *Attorney-General v. Wilson*, 362

4. Devise of copyhold land in fee upon condition that the devisee, within one month pay 2,000*l.* to the testator's executor, to be applied, after payment of debts and legacies, to charitable purposes. The testator died without leaving any customary heir or next of kin.

Held, upon appeal, that the proportion of the 2,000*l.*, which was void by the mortmain act, was to be considered as real estate undisposed of, and that the devisee, and not the crown, was entitled to it. *Henchman v. The Attorney-General*, 485

5. A bequest of money to a charitable institution "towards building alms-houses to the said institution," is *prima facie* a bequest for buying land and building upon it, and consequently void under the Statute of Mortmain. But matter *dehors* the will may be looked at for the purpose of placing the court in the situation of the testator, in order to determine whether the testator contemplated building upon land already in mortmain, or to be acquired by other means than the application of the legacy: Held, in the particular case, that the extrinsic evidence, so admitted, was insufficient to support the bequest. *Giblett v. Hobson*, 510

6. Where a testator devised certain estates to the Cordwainers' Company for the interest, use and performance of his will; and gave a moiety of the rents to his brother for life, and out of the remainder of the rents directed certain specified payments to be made to charitable purposes, and to the officers of the company, with a gift over to his brother in fee, if the company should neglect to perform his will; it was held, that the company took a beneficial interest in the rents of the estates, subject to the payments of the specified sums for charitable purposes; and an information seeking to have the whole augmented rents, or a proportional part of them, applied to purposes of charity was dismissed with costs. *Attorney-General v. Cordwainers' Company*, 534

7. Jurisdiction of the court in regulating the management of free schools, and controlling the conduct of the schoolmasters of such charitable foundations.

Before the Statute of 1 W. & M. c. 21, a commission of charitable uses could not be issued by Commissioners of the Great Seal. A decree of commissioners of charitable uses made during the Commonwealth in 1649, when there was no Lord Chancellor or Lord Keeper, was, therefore

held, upon appeal, to be a nullity. *Attorney-General v. Governors of Atherstone School*, 544

#### CONVEYANCE OF LEGAL ESTATE.

The owner of an equitable estate conveyed it to trustees upon trust for sale, and by a deed of even date declared the trusts upon which the produce of the sale were to be applied. The party, who had the mere legal estate, and no beneficial interest, refused to convey it to the equitable trustee, unless the persons interested as *cestuis que trust* under the deed of even date were made parties to the conveyance. He was not justified in that refusal, but as he had acted *bona fide* under the advice of a conveyancer of character, the court made the decree against him without costs. *Angier v. Stannard*, 566

#### COPYHOLD.

1. The surrenderee of a copyhold is an assignee of a reversion within the Statute of 32 Hen. VIII, c. 34, and may maintain an action of covenant upon a lease made by his surrenderor, and the defendant in such action cannot protect himself by alleging the invalidity of the lease. *Wheaton v. Peacock*, 325

2. The lord of the manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years. *Ibid.*

#### CORPORATIONS.

Principles upon which the account is to be taken against corporations, who are trustees of charities, and have misapplied the funds. *Attorney-General v. The Mayor of Newbury*, 647

#### COSTS.

1. A party gave notice of a motion, and died before the motion was heard, and the suit was revived by his executors, who declined to proceed with the motion. The bill revived by the executors was dismissed with costs. The costs of the abandoned motion are not costs in the cause. *Lewis v. Armstrong*, 69

2. The insufficiency of the fund to pay the debts, is the only case in which the plaintiff in a creditor's suit is entitled to

his costs as between solicitor and client.  
*Brodie v. Bollen*,

510

3. A witness, on the overruling of his demurrer, is liable to pay the same costs as a defendant, by analogy to the thirty-second of the new orders of 1828. *Sawyer v. Birchmore*,

578

## COVENANT.

1. The usual covenants between landlord and tenant will not extend to covenants in restraint of trade; and the stipulation that the premises should not be converted into a school, does not imply and cannot be extended to a restriction against the carrying on of other trades. *Van v. Corpe*,

269

2. If an agreement for a lease contain no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants, and a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease. *Probert v. Parker*

280

3. A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease.

*Quære*, whether he has such notice of unusual covenants.

But where a party entered into an agreement with a lessee for an under-lease, and informed him of the nature of the business which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to a representation that there was no such prohibiting covenant. *Flight v. Barton*,

282

4. It is the duty of a person contracting for an under-lease, to inform himself of the covenants contained in the original lease; and, if he enters and takes possession of the property, he will be bound by those covenants.

Where the original lease contained unusual covenants, and the defendant entered into an agreement with the plaintiff for an under-lease, and took possession of the premises, no reference to covenants being made in the agreement, but the defendant's solicitor having had an opportunity of inspecting the original lease, it was held that the defendant was bound to

accept a lease with the unusual covenants contained in the original lease. *Cosser v. Collinge*,

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## CREDITOR'S SUIT.

The insufficiency of the fund to pay the debts, is the only case in which the plaintiff in a creditor's suit is entitled to his costs as between solicitor and client. *Brodie v. Bollen*,

510

## CUMULATIVE LEGACY.

A testatrix gave the sum of 100*l*. to be paid to her brother C. T., immediately after the decease of her husband and in default of issue of their marriage; and, in a subsequent part of her will, she gave 100*l*. to the same brother, and concluded her will by directing that legacies, to which no time of payment was affixed, should be paid within three months after the death of her husband: Held, that the testatrix intended only to give a single legacy of 100*l*. to C. T. *Manning v. Thesiger*,

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## D

## DEMURRER OF WITNESS.

Demurrer by a witness examined by the plaintiffs, on the ground that he had been the solicitor of some of the defendants, and that the interrogatory required the disclosure of confidential communications, overruled, the witness being bound to produce letters communicated to him from collateral quarters to which the interrogatory pointed, and to answer questions seeking information as to matters of fact, as distinguished from confidential communications. *Sawyer v. Birchmore*,

578

## DENIZATION.

An alien, resident in England, purchased an equitable interest in freehold lands, and also a lease for a long term of years, and afterwards obtained letters of denization, which in terms conferred upon him, not only the power of acquiring lands in future, but of retaining and enjoying all lands which he had theretofore acquired: Held, that he had power to devise the freehold and chattel interest in land which he had purchased previously to the letters of denization.

By his will, he directed all his property to be sold and converted into money, and

after charging this mixed fund with his debts and legacies, gave the residue to aliens resident abroad, one of whom was his heir at law: Held, that the rule which is applicable to charitable bequests, was applicable in such a case; that the interest in land and the pure personal estate must respectively be valued and bear their proportions of the debts and legacies; and that the residue of the interest in land belonged to the crown; and the residue of the pure personal estate to the aliens. *Fourdrin v. Gowdey*, 383

## DISCOVERY.

If, in a bill for discovery in aid of the defence to an action, a plaintiff, who is not a party to the record at law, be joined with co-plaintiffs, the defendants in the action, the bill is demurrable.

Certain bills of exchange, the second parts of which were made payable to the order of the treasurer of the royal treasury of Portugal, were accepted by bankers in London, on behalf of a customer who was substantially interested in such bills as one of the subscribers to a loan raised by the government of Portugal under the regency of Don Miguel. After the expulsion of Don Miguel, and the establishment of Donna Maria as Queen of Portugal, the second parts of the bills in question were indorsed by the treasurer of the royal treasury of Portugal, (the same individual who had filled that office at the time when the bills were drawn,) to an agent of the Queen of Portugal, and by that agent were presented for payment to the bankers. The bankers refused payment on the ground that they had reason to doubt whether the indorser was the officer to whose order the bills were meant to be payable, and whether he had any property or interest in the bills; and an action was thereupon brought by the indorsee against the acceptors to recover the amount.

To a bill filed by the bankers, the acceptors, and by the customer on whose behalf they accepted the bills, against the indorsee, and the Queen of Portugal, praying for a discovery in aid of the defence to the action, a commission to examine witnesses abroad, and an injunction, a demurrer was allowed, on the ground of misjoinder of plaintiffs who were defendants in the action, but who had no interest, except as agents, in the subject matter of the suit, with a plaintiff who was no party to the action, but substantially interested in the subject matter of the suit.

Whether the bill was not demurrable

on the ground of the Queen of Portugal having been improperly made a defendant, *quære?* *Glyn v. Soares*, 416

## DOUBLE PROVISION.

W. bequeathed 5,000*l.* to the daughter of his brother J., charged on his real estates, and authorized the interest to be raised for her maintenance, if J. should so direct; and he devised his real estates, so charged, to J. in fee. J. bequeathed 10,000*l.* in trust for his daughter for life, and after her death in trust for her children, and declared that that sum should be in addition to the sum to which she was entitled under W.'s will. The daughter afterwards married. Her father advanced to her husband 15,000*l.* as her marriage portion, and, by the settlement, pin money, and a jointure for the wife, and portions for the younger children of the marriage, were provided out of the husband's property, and the 15,000*l.* were declared to be in satisfaction of the sums to which the wife was entitled under W.'s will: Held, (affirming the decision of the Vice-Chancellor,) that the 10,000*l.* legacy was not adeemed by the marriage portion. *Wharton v. Lord Durham*, 472

Reversed by the House of Lords.

## DOUBLE LEGACY.

See WILL. 1.

## E

## ELECTION.

The legatee of a house, held by the testator on a lease at a reserved rent higher than it could be let after his death, cannot reject the gift of the lease and retain an annuity under the will, but must take the benefit *cum onere*. *Talbot v. The Earl of Radnor*, 254

## EXAMINATION.

A defendant may obtain an order, as of course, to examine a co-defendant after a decree, saving just exceptions. *Van v. Corps*, 278

## EXCEPTIONS.

1. When the Master, upon a reference as to the priority of incumbrancers, reports against the priority of a particular party,

and states the facts upon which he had come to that conclusion, the regular course is to take an exception to the conclusion, and not to take exceptions to the particular facts, because the Master's conclusion may be correct, though particular facts be mistaken. *Hardley v Hewitt*, 28

2. Where one general exception, consisting of several distinct objections which are specified as the grounds of the exception, is taken to a report in favor of a title, and the court overrules the exception as to some of the objections, and allows it as to others, the deposit will be divided. *Whitton v. Peacock*, 325

### EXECUTOR.

Executors will not be allowed to charge for the employment of an agent, except under very special circumstances.

An exception to the Master's report, by which he had reduced an executor's charge for the employment of an agent at 5 per cent. to 2 1-2 per cent., overruled. *Weiss v. Dill*, 26

### EXECUTORY BEQUEST.

A bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends and profits as may be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four without leaving issue, is not void as too remote, but gives a present vested interest with an executory bequest over in case of death under twenty-four without leaving issue. *Bland v. Williams*, 411

## F

### FAMILY ARRANGEMENT.

Construction of a clause in a marriage settlement.

A court of equity will not direct payments made under a mistaken construction of a doubtful clause in a settlement to be refunded, after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction. *Clifton v. Cockburn*, 76

### FOREIGN COURTS.

See INJUNCTION, 1.

### FRAUD.

Where one solicitor is employed in a mortgage transaction, he is to be considered as solicitor both for mortgagee and mortgagor, and notice to such solicitor is notice to the mortgagee; and where the solicitor was himself the author of a fraud which affected the title, and the fraud was committed under circumstances, apparent upon the face of the deed fraudulently obtained, which would have excited the suspicion of a professional man, and have led to inquiry, it was held at the Rolls, first, that the mortgagee was as fully affected with notice of the actual fraud, as if the fraud had been committed by a third person, and the knowledge of it acquired by the solicitor. Secondly, that the circumstances, under which the fraud was committed, were sufficient to fix the mortgagee with constructive notice, and that if, in any mortgage or other transaction, a party does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation with respect to constructive notice, as he would have been, if he had employed a solicitor.

The decision was affirmed, upon appeal, on the second ground, the Lord Chancellor being of opinion that the mortgagee was not fixed with actual notice of the fraud, which, though known of course to his solicitor who was the perpetrator of the fraud, it was equally certain that the solicitor would conceal. *Kennedy v. Green*, 669

See GIFT TO CONFIDENTIAL AGENT.

### FREE SCHOOLS.

Jurisdiction of the court in regulating the management of free schools, and controlling the conduct of the schoolmasters of such charitable foundations. *Attorney-General v. Governors of Atherstone School*, 544

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Gift by deed, subject to a power of appointment by the donor, from a person upwards of ninety years of age, to a confidential agent, who had for many years

been in habits of friendship with the donor, without the intervention of a disinterested third person, the solicitor who drew the deed being the solicitor of the person who took the benefit under it, declared void at the Rolls; but supported, under all the circumstances, upon appeal. *Hunter v. Atkins*, 113

**H**

**HEIR.**

Where a real estate is directed to be sold, and a part of the produce is to be applied to a purpose which fails, and the residue of the produce is given over, the heir, and not the residuary devisee, will take the sum intended for the particular purpose.

Where the real estate is not directed to be sold, and the residuary gift is not of the produce, but of the *corpus* of the estate, then if a gift, intended for a particular purpose which fails, is to be considered as an exception from the residuary gift, the heir will take; if it is to be considered as a charge upon the devised estate, the residuary devisee will be entitled to the benefit of the failure. *Cooke v. Stationers' Company*, 262

**I**

**INFANT TRUSTEE.**

Where the court, by its decree, declares that an infant heir is a trustee, and the right of the party entitled to a conveyance is established by that decree, the court will at the same time direct a conveyance by the infant heir, a petition for that purpose being unnecessary. *Broom v. Broom*, 443

**INJUNCTION.**

1. Injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt, under the circumstances continued. Jurisdiction of the Court of Chancery to stay the proceedings of parties in foreign courts. *Lord Portarlington v. Souby*, 104

2. Injunction, at the instance of parliamentary commissioners for cleansing and improving the river Witham and its navigation, and the drainage of the adjacent lands, against the erection or use of a steam engine by parliamentary trustees for draining a particular district, applied for on the

ground of probable damage to the banks of the river, into which an increased body of water was thereby expected to be thrown, and also on the ground of apprehended injury to the drainage of the lands within the jurisdiction of the commissioners, refused.

Principles upon which the court proceeds in interposing by injunction between public companies or trustees in cases of apprehended mischief or nuisance. *Rippon v. Hobart*, 174

3. Where the lord of a manor, who claims against the tenants the right of property in the mines within the manor, has stood by for a long period and allowed the tenants, without objection, to work the mines, and to expend large sums of money upon their mining operations, the court will not assist him by making a decree for an injunction or account against the tenants, but will leave him to his legal remedy.

Distinction between the cases in which the right to an account is incident to the injunction, and those in which it is independent of that relief.

Peculiarity of the case of mines in this respect.

The right to an account, even in the case of mines, may be lost by laches. *Parrott v. Palmer*, 632

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**JURISDICTION.**

1. Injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt, under the circumstances continued. Jurisdiction of the Court of Chancery to stay the proceedings of parties in foreign courts. *Lord Portarlington v. Souby*, 104

2. Where in a marriage settlement a power of appointment by will, signed, sealed, published and declared in the pre-

ence of two witnesses, is given to the wife, notwithstanding her coverture, and an instrument afterwards executed by the wife is proved as a will, this court is concluded by the decision of the Ecclesiastical Court that the instrument propounded is a will, and is bound to consider it as a valid execution of the power, if the instrument be proved in this court to have been executed with the formalities prescribed by the power. *Douglas v. Cooper*, 878

## L

### LANDLORD AND TENANT.

The usual covenants between landlord and tenant, will not extend to covenants in restraint of trade; and the stipulation that the premises should not be converted into a school does not imply, and cannot be extended to a restriction against the carrying on of other trades. *Van v. Corpe*, 269

### LEASE.

1. Where, in an agreement for the lease of a house to be granted by the defendants to the plaintiff, it was stipulated that the lease should contain the usual covenants between landlord and tenant, and that the house should not be converted into a school, it is immaterial whether the plaintiff had or had not notice that the defendants derived their title under a lease from another person, because the agreement amounts to a representation on the part of the defendants, that they were at liberty to grant a lease conformably to the terms of the agreement. *Van v. Corpe*, 269

2. If an agreement for a lease contain no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants, and a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease. *Probert v. Parker*, 280

3. A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease.

*Quere*, whether he has such notice of unusual covenants.

But where a party entered into an agreement with a lessee for an under-lease, and informed him of the nature of the

business which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to a representation that there was no such prohibiting covenant. *Flight v. Barton*, 282

4. It is the duty of a person contracting for an under-lease to inform himself of the covenants contained in the original lease; and, if he enters and takes possession of the property, he will be bound by those covenants.

Where the original lease contained unusual covenants, and the defendant entered into an agreement with the plaintiff for an under-lease, and took possession of the premises, no reference to covenants being made in the agreement, but the defendant's solicitor having had an opportunity of inspecting the original lease, it was held that the defendant was bound to accept a lease with the unusual covenants contained in the original lease. *Cosser v. Collinge*, 283

### LEGACY.

Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and, if the executor fail to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy, out of the general assets of the testator. *Knight v. Davis*, 358

### LEGACY DUTY.

An instrument vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary, and, consequently, not liable to the payment of legacy duty. *Thompson v. Browne*, 32

### LIMITATIONS.

The lord of the manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years. *Whitton v. Peacock*, 325

### LORD OF MANOR.

See ACCOUNT.



## LUNATIC.

1. Order made by the Lord Chancellor as protector under the 3 & 4 W. IV, c. 74, to enable a *quasi* tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund. *In the Matter of Yea*, 245

2. The court has no jurisdiction under the 1 W. IV, c. 65, and 3 & 4 W. IV, c. 74, to authorize the committee of the estate of a lunatic tenant in tail in possession, to grant leases of the lunatic's estate for a term of twenty-one years, so as to bind the remainder-men. *In the Matter of Starkie*, 247

3. Order made for payment out of court of a sum of stock, of which the petitioner was *quasi* tenant in tail in possession under a settlement, on his producing the deed enrolled, or an affidavit of the enrolment of the deed, whereby, in pursuance of the provisions of the 3 & 4 W. IV, c. 74, s. 71, he had barred the estate tail, and remainders over in the stock in question. *In the Matter of Smythe*, 249

4. The 3 & 4 W. IV, c. 74, does not authorize the Lord Chancellor, when the tenant in tail in possession is in a state of hopeless lunacy, to consent to the first tenant in tail in remainder, barring the subsequent limitations, even for the purpose of preventing the settled estate from going over to collateral relations. *In the Matter of Blewitt*, 250

of redemption, and the interest reserved being 5 per cent. instead of 4 1-2 per cent., which was the rate reserved in the original mortgage. This is, in effect, a new mortgage by the heir, and the 30,000*l.* is thereby constituted his personal debt.

The same mortgagor made another mortgage of gavelkind lands, which, upon his death intestate descended to his two brothers as co-parceners. The elder brother, who was a common law heir of the mortgagor, purchased of the other brother his moiety of the gavelkind lands, and covenanted with him to pay the whole mortgage money. He did not thereby make the mortgage money his personal debt. *Barham v. The Earl of Thanet*, 607

## MORTMAIN.

A bequest of money to a charitable institution "towards building alms-houses to the said institution," is *prima facie* a bequest for buying land and building upon it, and consequently void under the Statute of Mortmain. But matter *dehors* the will may be looked at for the purpose of placing the court in the situation of the testator, in order to determine whether the testator contemplated building upon land already in mortmain, or to be acquired by other means than the application of the legacy: Held, in the particular case, that the intrinsic evidence, so admitted, was insufficient to support the bequest. *Giblett v. Hobson*, 510

## N

## MISJOINDER OF PLAINTIFFS.

See DISCOVERY.

## MORTGAGE.

A mortgage is made of the manor and lands of S. and other valuable estates, to secure a debt of 80,000*l.* and interest. The mortgagor dies intestate, leaving the debt wholly unpaid; and his heir being pressed to pay off 30,000*l.*, part of the 80,000*l.*, procures a person to advance the sum required for the purpose, and the original mortgagee thereupon joins with the heir of the mortgagor, in a deed conveying the manor and lands of S. to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption altogether different from the prior equity

## MOTION (ABANDONED.)

See COSTS.

## N

## NEW TRIAL.

Upon the trial of an issue, a bill of exceptions for an alleged misdirection of the judge will not lie; but the regular course is to apply to the court which directed the issue, for a new trial. *Armstrong v. Armstrong*, 52

## NEXT OF KIN.

Trust in a marriage settlement, to raise a sum of money charged on the settled estate, at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the exe-

outors or administrators of the wife, held, upon the whole scope and context of the instrument, a trust for the next of kin of the wife, although she died in the husband's lifetime. *Bulmer v. Jay*, 197

2. A testator bequeathed part of the residue of his property to trustees, in trust for his daughters during their lives, and after their respective deceases, for their children, and in case there should be no children of his daughters respectively, in trust for such person or persons as should happen to be his next of kin according to the Statute of Distributions: Held, that upon the death of a daughter, who survived the testator, without issue, her share went to the persons who were the testator's next of kin at her death. *Buller v. Bushnell*, 232

#### NOTICE.

See FRAUD.

#### P

#### PAROL EVIDENCE.

A bequest of money to a charitable institution "towards building alms-houses to the said institution," is *prima facie* a bequest for buying land and building upon it, and consequently void under the Statute of Mortmain. But matter *dehors* the will may be looked at for the purpose of placing the court in the situation of the testator, in order to determine whether the testator contemplated building upon land already in mortmain, or to be acquired by other means than the application of the legacy: Held, in the particular case, that the extrinsic evidence, so admitted, was insufficient to support the bequest. *Giblett v. Hobson*, 510

#### PARTNERSHIP.

1. By the terms of the articles of agreement, usually entered into between the Postmaster-General and the persons supplying horses for the mail coaches, the Postmaster-General cannot exercise the power of nominating a new party to perform neglected duty, for which provision is made in the articles, without notice to all the parties to the agreement, who have the option of performing the neglected duty themselves.

A bill for an account by a substituted party, of whose nomination the Postmas-

ter-General had given no notice to one of the defendants, an original contracting party, who was entitled to the option of performing the neglected duty himself, was, therefore, dismissed at the original hearing; but the decision was reversed upon appeal, upon the ground that, although no notice had been given by the Postmaster-General, the defendant knew of the nomination of the plaintiff, and that his conduct was equivalent to a waiver of the option. *Lovegrove v. Nelson*, 1

2. An agreement for a secret partnership is a contravention of the laws made for regulating the business of a pawnbroker, and no legal partnership is thereby constituted. *Armstrong v. Armstrong*, 45

#### PAWNBROKERS.

See PARTNERSHIP, 2.

#### PIN MONEY.

A wife cannot recover more than a year's arrears of pin money after long acquiescence in the receipt of it by her husband, notwithstanding claims made by the wife during the husband's lifetime, and a promise made by the husband that she should have an equivalent, such promise not, under the circumstances, amounting to an undertaking to pay the arrears. *Thrupp v. Harman*, 513

#### PLEADING.

1. Upon a bill filed by trustees for the directions of the court in execution of the trusts of a will, if the trustees have notice of any doubt as to the title of the testator to a part of the estate devised, the person who may be benefited by that doubt is properly made a defendant to the suit, and the court will not proceed to the execution of the trusts of the will until that doubt is removed, either by a proceeding at law, or by such other course of inquiry as the court may think proper to direct. *Talbot v. The Earl of Radnor*, 252

2. If, in a bill for discovery in aid of the defence to an action, a plaintiff, who is not a party to the record at law, be joined with co-plaintiffs, the defendants in the action, the bill is demurrable.

Certain bills of exchange, the second parts of which were made payable to the order of the treasurer of the royal treasury,

Portugal, were accepted by bankers in London, on behalf of a customer who was substantially interested in such bills as one of the subscribers to a loan raised by the government of Portugal under the regency of Don Miguel. After the expulsion of Don Miguel, and the establishment of Donna Maria as Queen of Portugal, the second parts of the bills in question were indorsed by the treasurer of the royal treasury of Portugal (the same individual who filled that office at the time when the bills were drawn) to an agent of the Queen of Portugal, and by that agent were presented for payment to the bankers. The bankers refused payment, on the ground that they had reason to doubt whether the indorser was the officer to whose order the bills were meant to be payable, and whether he had any property or interest in the bills; and an action was thereupon brought by the indorsee against the acceptors to recover the amount.

To a bill filed by the bankers, the acceptors, and by the customer on whose behalf they accepted the bills, against the indorsee, and the Queen of Portugal, praying for a discovery in aid of the defence to the action, a commission to examine witnesses abroad, and an injunction, a demurrer was allowed, on the ground of misjoinder of plaintiffs who were defendants in the action, but who had no interest, except as agents, in the subject matter of the suit, with a plaintiff who was no party to the action, but substantially interested in the subject matter of the suit.

Whether the bill was not demurrable on the ground of the Queen of Portugal having been improperly made a defendant, *quære*. *Glyn v. Soares*, 415

## POLICY.

See VOLUNTARY DEED, 1.

## POSTMASTER-GENERAL.

By the terms of the articles of agreement usually entered into between the Postmaster-General and the persons supplying horses for the mail coaches, the Postmaster-General cannot exercise the power of nominating a new party to perform neglected duty, for which provision is made in the articles, without notice to all the parties to the agreement, who have the option of performing the neglected duty themselves.

A bill for an account by a substituted party, of whose nomination the Postmaster-General had given no notice to one of the defendants, an original contracting

party, who was entitled to the option of performing the neglected duty himself, was therefore dismissed at the original hearing; but the decision was reversed upon appeal, upon the ground that, although no notice had been given by the Postmaster-General, the defendant knew of the nomination of the plaintiff, and that his conduct was equivalent to a waiver of the option. *Lovegrove v. Nelson*, 1

## POWER.

1. Where the court directed a deed of appointment as to the respective interests of a father and his children to be made within a limited time, and a deed was executed within the time, containing a power of revocation; it was held, that the intention of the court was defeated, and that the deed was consequently void. *Piper v. Piper*, 159

2. Where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate. *Ray v. Adam*, 237

3. Where in a marriage settlement a power of appointment by will, signed, sealed, published and declared in the presence of two witnesses, is given to the wife, notwithstanding her coverture, and an instrument afterwards executed by the wife is approved as a will, this court is concluded by the decision of the Ecclesiastical Court, that the instrument propounded is a will, and is bound to consider it as a valid execution, if the instrument be proved in this court to have been executed with the formalities prescribed by the power. *Douglass v. Cooper*, 378

4. A general gift, to operate as an execution of a power, must either refer to the power, or to the subject of it; and a reference to part of the subject, or to some of many subjects of the power, will not be sufficient to make a will operate as an execution of the power, where there is no other indication of an intention to execute it. *Hughes v. Turner*, 666

## PRACTICE.

1. Upon the trial of an issue, a bill of

exceptions for an alleged misdirection of the judge will not lie; but the regular course is to apply to the court which directed the issue for a new trial. *Armstrong v. Armstrong*, 52

2. Injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt, under the circumstances continued. Jurisdiction of the Court of Chancery to stay the proceedings of parties in foreign courts. *Lord Portarlington v. Souby*, 104

3. The insufficiency of the fund to pay the debts, is the only case in which the plaintiff in a creditor's suit is entitled to his costs as between solicitor and client. *Brodie v. Bolton*, 510

4. It is contrary to the practice of the court to permit a second rehearing before the Great Seal, unless under special circumstances. *Mousley v. Carr*, 205  
And see the order made in that cause.

5. A defendant may obtain an order, as of course, to examine a co-defendant after a decree, saving just exceptions. *Vas v. Corpe*, 269

#### PRINCIPAL AND SURETY.

A. and B. executed a joint and several bond, to secure a sum of money with interest to W.; subsequently to the deaths of A. and W., the executors of W. obtained from B., as principal, and from C. as surety, another bond to secure a part of the money then due on the original bond, with interest. No payments were ever made in respect of the first bond, but after C.'s death the second bond was paid off out of C.'s estate, and his representatives thereupon procured the original bond to be assigned to them: Held, on a suit to administer the estate of A., that C.'s representatives were entitled, by virtue of the assignment, to rank as specialty creditors of A.'s estate, in respect of the payments made by C. or his estate on the second bond, to the extent of the penalty in the assigned bond. *Hodgson v. Shaw*, 183

2. In general, a release to the principal debtor is, in equity, a release to the surety; but if the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding

the release, will, in the absence of evidence to the contrary, retain his right against the surety. *Liall v. Hitchens*, 426

#### PROTECTOR OF SETTLEMENT.

Order made by the Lord Chancellor as protector under the 3 & 4 W. IV, ch. 74, to enable a *quasi* tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund. *In the Matter of Yea*, 245

#### PUBLIC COMPANIES.

See INJUNCTION, 2.

#### RE

#### REHEARING.

It is contrary to the practice of the court to permit a second rehearing before the Great Seal, unless under special circumstances. *Mousley v. Carr*, 205  
And see the order made in that cause. 291

#### REMOTENESS.

A testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and after her decease, for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the meantime; and in case any of the said children should die under twenty-one, and have one or more child or children who should survive the testator's daughter, and live to attain twenty-one, such child or children to be entitled to his or their parent's share: provided also, that in case any child or children of his daughter should die before attaining twenty-one, the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them if more than one, the issue of any deceased child or children to stand in the place of the parent or parents; with a limitation over, provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age: Held, that the limitation over was intended to take effect only on failure of grandchildren who

should survive the testator's daughter, and not live to attain twenty-one, and was, therefore, not too remote. *Trickey v. Trickey*, 560

# REPUBLICATION.

M. D., by a codicil to her will, duly attested to pass real estate, revoked an annuity given by her will; after reciting that one of the trustees named in her will was dead, she revoked the estates and powers given by her will to such deceased trustee, and devised the same to a new trustee, thereby placing the new trustee in the place and stead of the deceased trustee, as trustee for the purpose of her said will. She then gave a legacy to the new trustee, in consideration of his taking on himself the trusts thereby in him reposed, and she revoked a legacy given to the deceased trustee.

Held, on a rehearing, that this codicil did not operate as a republication of the testatrix's will, so as to pass an estate purchased between the date of the will and the date of the codicil. *Hughes v. Turner*, 666

# RESIDUARY DEVISEE.

Where a real estate is directed to be sold, and a part of the produce is to be applied to a purpose which fails, and the residue of the produce is given over, the heir, and not the residuary devisee, will take the sum intended for the particular purpose.

Where the real estate is not directed to be sold, and the residuary gift is not of the produce, but of the *corpus* of the estate, then if a gift, intended for a particular purpose which fails, is to be considered as an exception from the residuary gift, the heir will take; if it is to be considered as a charge upon the devised estate, the residuary devisee will be entitled to the benefit of the failure. *Cook v. Stationers' Company*, 262

# REVERSION.

The purchase of a reversion at an under value was set aside, and, under the special circumstances, was set aside with costs. *Bawtree v. Watson*, 339

# REVOCATION.

A married woman having a power to

appoint personal estate, held in trust for her, by her last will and testament, notwithstanding her coverture, made a will in exercise of her power during the life of her husband. She survived her husband, and afterwards took an assignment from her trustee of the personal estate to herself. This assignment does not operate as a revocation of the will. *Clough v. Clough*, 296

## S

# SALE.

Where the testator directs a sale with all convenient speed after his death, and directs the produce to be invested and the dividends to be paid to one for life, and the land remains unsold, the court considers twelve months as a reasonable time within which the estates ought to have been sold, and the produce invested, and will give to the tenant for life the rents of the unsold estate from that time. *Vickers v. Scott*, 500

# SATISFACTION.

A testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of 100*l.* to J., and another of 100*l.* to M., who was a married woman, to her separate use, independent of her husband; and it was left to his discretion either to pay the charges in his lifetime or to direct them to be paid by his executors. He did not pay them in his lifetime; but amongst other legacies which, by his will, he directed his executors to pay, was a sum of 500*l.* to J., and a sum of 100*l.* to M., not limited to her separate use: Held, that the sum of 100*l.* given to J. by the appointment of the wife, was satisfied by the 500*l.* bequeathed by the testator; and that the sum of 100*l.* bequeathed to M. was in addition to, and not a satisfaction of, the 100*l.* given to her separate use by the wife. *Fourdrin v. Goudley*, 383

# SEPARATE ESTATE.

1. Where a married woman, having separate estate, and living apart from her husband, employed a solicitor in various transactions, and promised by letters to pay him, but without referring to her separate estate, it was held, that her separate estate was liable to the payment of the solicitor's bill of costs. *Semble*, that the separate estate of a *feme covert* is lia-

ble in equity to her general engagements, as well upon an implied undertaking as by a written obligation. *Murray v. Barlea*, 210

2. A wife cannot recover more than a year's arrears of pin money after long acquiescence in the receipt of it by her husband, notwithstanding claims made by the wife during the husband's lifetime, and a promise made by the husband that she should have an equivalent, such promise not, under the circumstances, amounting to an undertaking to pay the arrears. *Thrupp v. Harman*, 518

#### SETTLEMENT.

Where a husband has married a ward without the consent of the court, the ward's interest, and that alone, is to be consulted in framing the settlement; unless the subordinate purpose of protection against the husband can be accomplished without prejudice to the ward.

A settlement approved by the Master, where no power of appointment in default of issue was given to the wife, but the property was given over to her next of kin, was reformed by giving to the wife such a power by will only, with provisions, that the property upon failure of children, and in default of such appointment, should go to her next of kin; and in the event of her surviving her husband and having no children, that it should be at her own disposal; and in the event of her marrying a second time and having children of the first marriage, that she should have a power of appointing to each child of the second marriage a sum not exceeding that given to each child of the first. *Birkett v. Hibbert*, 227

See FAMILY ARRANGEMENT.

#### SOLICITOR.

See SEPARATE ESTATE, 1.  
TAXATION, 1.

#### SPECIFIC PERFORMANCE.

1. Where, in an agreement for the lease of a house to be granted by the defendants to the plaintiff, it was stipulated that the lease should contain the usual covenants between landlord and tenant, and that the house should not be converted into a school, it is immaterial whether the plaintiff had or had not notice that the de-

fendants derived their title under a lease from another person, because the agreement amounts to a representation on the part of the defendants that they were at liberty to grant a lease conformably to the terms of the agreement. *Van v. Corpe*, 269

2. Where a parol agreement, varying the terms of the written agreement, is set up by the defendants in a suit for specific performance, and supported by evidence affording a presumption or suspicion of its existence, an inquiry will be directed. *Ibid.*

#### STAMP.

The court cannot sanction an agreement between the parties, that an objection for want of a proper stamp shall be waived; if, therefore, the objection comes to the knowledge of the court, no decree will be made until the instrument, duly stamped, is produced to the registrar. *Owen v. Thomas*, 353

#### STATUTES, CONSTRUCTION OF.

1. 3 & 4 W. IV, c. 74. *In the Matter of Yea*, 245

2. 1 W. IV, c. 65, and 3 & 4 W. IV, c. 74. *In the Matter of Starkie*, 472

3. 3 & 4 W. IV, c. 74, s. 71. *In the Matter of Smythe*, 249

4. 3 & 4 W. IV, c. 74. *In the Matter of Blewitt*, 250

5. 32 H. VIII, c. 34. *Whitton v. Peacock*, 325

6. 1 W. IV, c. 60, s. 8. *In re Dearden*, 508

#### STOCK.

By a marriage settlement, the husband covenanted to secure to the wife for her life, if she survived him, the dividends of a sum of 4,000*l.* navy 5 per cent. annuities. The husband had no stock in the navy 5 per cents. at the date of the settlement, or at any subsequent period. By an act of Parliament, the navy 5 per cents. were converted into new 4 per cents., and by another act it was provided, that all obligations for the transfer of navy 5 per cents. should be satisfied by a transfer of 105*l.* in the new 4 per cents. for every 100*l.* in the navy 5 per cents. By a sub-

sequent act the new 4 per cent. annuities were converted into new 3 1-2 per cent. annuities, and it was provided, that all obligations to transfer the new 4 per cents., should be satisfied by transferring an equal sum of new 3 1-2 per cents. The widow, under her settlement, is entitled only to a transfer of 105*l*. in the new 3 1-2 per cents. for every 100*l*. of the navy 5 per cents. under her husband's covenant. *Milward v. Milward*, 311

## SURETY.

A. and B. executed a joint and several bond, to secure a sum of money with interest to W.; subsequently to the deaths of A. and W., the executors of W. obtained from B., as principal, and from C. as surety, another bond to secure a part of the money then due on the original bond, with interest. No payments were ever made in respect of the first bond; but after C.'s death the second bond was paid off out of C.'s estate, and his representatives thereupon procured the original bond to be assigned to them: Held, on a suit to administer the estate of A., that C.'s representatives were entitled, by virtue of the assignment, to rank as specialty creditors of A.'s estate, in respect of the payments made by C. or his estate on the second bond, to the extent of the penalty in the assigned bond. *Hodgson v. Shaw*, 183

## SURVIVOR.

A married woman, by a testamentary instrument made in execution of a power contained in her marriage settlement, gave 2,000*l*., subject to the life interest of her husband, to trustees upon trust for the benefit of her child or children, to be equally divided between them, share and share alike; but in case the 2,000*l*. should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust, to invest and apply the interest to their maintenance and education, and when they should attain twenty-one or day of marriage, to pay to them their respective shares of the principal; and in case any of the children should happen to die before their portions should become payable, then the same should go and belong to the survivors or survivor of them.

The testatrix left a son and two daughters, all of whom had attained twenty-one at her decease. The son, and afterwards

a daughter, died in the lifetime of their father:

Held, that, on the death of the father, the surviving daughter was entitled to the 2,000*l*. by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which belonged to the representative of the deceased daughter. *Bright v. Rowe*, 316

## T

## TAXATION.

The assignees or executors of a bankrupt are not, under the statute, liable to pay the costs of taxation, if more than one-sixth of the bill of costs of the solicitor is deducted on taxation. *Wylashey v. Mashiter*, 298

## TESTAMENTARY INSTRUMENT.

An instrument, vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary, and, consequently, not liable to the payment of legacy duty. *Thompson v. Browne*, 32

## TRUSTEE.

1. Where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate. *Ray v. Adams*, 237

2. Where, in a trust deed for the satisfaction of debts, a discretion is vested in the trustees to refuse the benefit of that deed to any creditor, although his claim may be lawful, the court cannot empower the Master to ascertain who are entitled to the benefit of the deed; but if the trustees have no such absolute discretion, no creditor can be entitled to the benefit of the deed, until he has submitted his claim to the investigation and allowance of the trustees, and they have allowed it; or unless upon such application the trustees have refused to act in the execution of the trusts. *Wain v. The Earl of Egmont*, 445

3. Where the court, by its decree, declares that an infant heir is a trustee, and

the right of the party entitled to a conveyance is established by that decree, the court will at the same time direct a conveyance by the infant heir, a petition for that purpose being unnecessary. *Broom v. Broom*, 443

4. The eighth section of the 1 W. IV, ch. 60, relates to trusts only, and not to mortgages; and to positive or naked trustees, and not to constructive trustees, or trustees by operation of law. *In re Dear-den*, 508

See PLEADING, 1.

## V

### VENDOR AND PURCHASER.

1. Upon a bill filed by the vendor for the specific performance of a contract, it appeared that the defendant, in the course of correspondence between the solicitors, and upon a case stated on his part for the opinion of counsel, expressed himself willing to accept the title, if a particular objection then referred to were removed. That objection not being removed, the bill was filed, and the court ruled that the reference to the master as to the title must be in general terms, and not confined to the particular objection. *Lesturgeon v. Martin*, 255

2. An engagement by A. to answer the draft of B., for payment of a debt due from B. to C, no draft having been drawn by B., and no communication of the transaction between A. and B. having been made to C, raises no equity in C. to recover the amount of the debt from A.

The owner of a ship proposes to his agent, to whom he was indebted on account, to transfer the ship to him, provided the agent would answer the owner's draft for the amount of the repairs, in respect of which the owner was indebted to a third person not named. The ship was, in pursuance of this proposal, transferred to the agent; and the vendor afterwards became bankrupt, without having drawn upon the purchaser, and without any communication of the terms of the purchase having been made to the creditor to whom the vendor was indebted for the repairs.

There is no consideration between the purchaser and the vendor's creditor, to entitle the latter to recover from the purchaser the amount of the repairs. *Rattenbury v. Fenton*, 505

3. The rule that a purchaser for valuable consideration without notice is pro-

TECTED by the legal estate, extends not only to cases where his title is impeached by reason of some secret act, done by the vendor, or those under whom he claims, but to cases also where his title is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, provided such asserted title is clothed with possession, and the falsehood of the alleged fact could not have been discovered by reasonable diligence. *Jones v. Powles*, 581

4. A testator devised the lands to be purchased with the proceeds of certain estates sold in his lifetime, to the use of trustees and their heirs, upon trust, to pay the rents and profits to his daughter, whether married or unmarried, for her separate use, and not subject to the debts or control of any husband; and after her decease, upon further trust, to convey the lands to such persons and for such uses, estates and interests as his daughter should by will, attested by three credible witnesses, and whether married or single, appoint; and for want of such, upon trust, to convey the freehold and inheritance of the lands to the right heirs of his daughter: and the testator further directed, that as to so much of such proceeds as should not have been laid out in lands, the trustees should invest the same in the public funds, and pay the dividends into the proper hands of his daughter, during her life, for her sole use and benefit, whether married or unmarried, and not subject to the debts or control of any husband; and after her decease, upon further trust, to pay and transfer the same to such persons, and for such intents and purposes, and in such manner as she should, by her last will and testament, and whether sole or covert, appoint; and in default thereof, in trust, to pay, transfer and assign the same to the executors or administrators of his daughter. After the testator's death lands were purchased, and were conveyed to the trustees of his will, upon the trusts and for the purposes expressed and declared in the will. A contract having been subsequently entered into by the trustees for the sale of those lands, it was held, that the trustees, with the concurrence of the testator's daughter, could make a good title to the purchaser. *Webb v. Lord Shaftesbury*, 599

5. Where an estate is charged generally with the payment of debts and legacies, and the debts have been paid, but not the legacies, the purchaser will not be bound to see to the application of the purchase money, unless it be proved that he knew



of the payment of the debts; and the taking of a general bond of indemnity, or of a bond of indemnity against the legacies only, will not raise the inference that he knew of such payment. *Johnson v. Kennet*, 624

6. A vendor, in lien of the price of 3,000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of her intended husband and herself, in case the purchaser should so long live, the purchaser engaging that his personal representative should, within three months after his decease, in certain events, but not in all events, pay a further sum of 3,000*l.* This is not a security, but a substitution for the price; and the lien of the vendor on the land is discharged. *Parrot v. Sweetland*, 655

### VESTING

A testator gave legacies of 50*l.* each to six grandchildren, when the youngest grandchild should come of age, payable from the produce of a real estate then to be sold, and if either of those children should not live to come of age, nor have an heir born in wedlock, he directed the 50*l.* to be equally divided among the surviving children. E. M., one of the six grandchildren, married during her minority, but afterwards attained twenty-one, and before the youngest grandchild attained that age, she died, leaving a child. Held, that her legacy of 50*l.* was a vested interest, and belonged to her personal representatives. *Murkin v. Phillips*, 257

### VOLUNTARY DEED.

J. B. made a voluntary assignment, by deed, of a policy of assurance upon his own life for 1,000*l.*, to trustees, upon trust for the benefit of his sister and her children, if she or they should outlive him. The deed was delivered to one of the trustees, and the grantor kept the policy in his own possession. No notice of the assignment was given to the assurance office, and J. B. afterwards surrendered, for a valuable consideration, the policy and a bonus declared upon it, to the assurance office. Upon a bill filed by the surviving trustee of the deed, to have the value of the policy replaced, the court held that, upon the delivery of the deed, no act remained to be done by the grantor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed. *Fortescue v. Barnett*, 36

### U

#### UNCERTAINTY.

See WILL, 10.

### W

#### WARD.

Where a husband has married a ward without the consent of the court, the ward's interest, and that alone, is to be consulted in framing the settlement; unless the subordinate purpose of protection against the husband can be accomplished without prejudice to the ward.

A settlement approved by the Master, where no power of appointment in default of issue was given to the wife, but the property was given over to her next of kin, was reformed by giving to the wife such a power by will only, with provisions, that the property, upon failure of children, and in default of such appointment, should go to her next of kin; and in the event of her surviving her husband, and having no children, that it should be at her own disposal; and in the event of her marrying a second time and having children of the first marriage, that she should have a power of appointing to each child of the second marriage, a sum not exceeding that given to each child of the first. *Birkett v. Hibbert*, 227

### WILL.

1. A testatrix gave the sum of 100*l.* to be paid to her brother C. T. immediately after the decease of her husband, and in default of issue of their marriage; and in a subsequent part of her will she gave 100*l.* to the same brother, and concluded her will by directing that legacies, to which no time of payment was affixed, should be paid within three months after the death of her husband: Held, that the testatrix intended only to give a single legacy of 100*l.* to C. T. *Manning v. Theobald*, 29

2. Bequest of residue to the testator's daughters A. and B. in equal proportions; and in case of the death of either, the whole to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years; but if not, then among the children of C. A. and B. survived the testator; and A.,

who died without having been married, bequeathed the whole of her property to B.: Held, that the bequest did not become absolutely vested in A. and B. on the death of the testator, but continued subject to the executory bequest over in favor of C. *Child v. Giblett*, 71

3. A testator gave his whole property to his wife, upon condition that she should pay an annuity of 130*l.* to his mother during her life, and after the death of his wife to be equally divided between those of his children who should survive her, share and share alike. All the testator's children died in the lifetime of his widow, who married again, and died leaving her husband surviving her; Held, upon her death, that in the events which had happened, the testator's property was undisposed of, and that the next of kin, and not the second husband in right of his wife, were entitled to it. *Joslin v. Hammond*, 110

4. Where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate. *Ray v. Adams*, 237

5. The legatee of a house, held by the testator on a lease at a reserved rent higher than it could be let for after his death, cannot reject the gift of the lease and retain an annuity under the will, but must take the benefit *cum onere*. *Talbot v. The Earl of Radnor*, 254

6. A testator bequeathed part of the residue of his property to trustees, in trust for his daughters during their lives, and after their respective deceases, for their children; and in case there should be no children of his daughters respectively, in trust for such person or persons as should happen to be his next of kin according to the Statute of Distributions: Held, that upon the death of a daughter, who survived the testator, without issue, her share went to the persons who were the testator's next of kin at her death. *Buller v. Bushnell*, 232

7. A testator gave legacies of 50*l.* each to six grandchildren, when the youngest grandchild should come of age, payable from the produce of a real estate then to be sold; and, if either of those children should not live to come of age, nor have an heir born in wedlock, he directed the

50*l.* to be equally divided among the surviving children. E. M., one of the six grandchildren, married during her minority, but afterwards attained twenty-one, and before the youngest grandchild attained that age, she died, leaving a child: Held, that her legacy of 50*l.* was a vested interest, and belonged to her personal representatives. *Murkin v. Phillipson*, 257

8. A bequest by a testator of one-third of his personal estate to his daughter, and in case of his decease, to have the interest therein, and principal when she attained the age of twenty-five: Held to give a vested interest to the daughter, though she died under that age. *Bredon v. Tugman*, 289

9. A married woman having a power to appoint personal estate, held in trust for her, by her last will and testament, notwithstanding her coverture, made a will in exercise of her power during the life of her husband. She survived her husband, and afterwards took an assignment from her trustee of the personal estate to herself. This assignment does not operate as a revocation of the will. *Clough v. Clough*, 296

10. A testator made a bequest in the following words:—"I give to my executors the sum of 1,000*l.* upon trust, to be invested in the funds of the Bank of England during the lives of the survivors or survivor, for the widows of J. S. and T. D., to be divided between them, share and share alike." The testator appointed two executors of his will. One of the widows died in the testator's lifetime; the other widow survived the testator, and received the interest of the 1,000*l.* during her life. Held, upon the death of the surviving widow, that the bequest was void for uncertainty, and belonged therefore to the residuary legatee. *Hoffman v. Hankey*, 376

11. A testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of 100*l.* to J., and another of 100*l.* to M., who was a married woman, to her separate use, independent of her husband; and it was left to his discretion either to pay the charges in his lifetime, or to direct them to be paid by his executors. He did not pay them in his lifetime; but among other legacies which by his will he directed his executors to pay, was a sum of 500*l.* to J., and a sum of 100*l.* to M., not limited to her separate use: Held, that the sum of 100*l.* given to J. by the appointment of the

wife, was satisfied by the 500*l.*, bequeathed by the testator; and that the sum of 100*l.* bequeathed to M., was in addition to and not a satisfaction of the 100*l.* given to her separate use by the wife. *Fourdrin v. Gowdey*, 409

12. A testator, having devised his estates in a particular way, directed that a different disposition of them should take place in case certain contingent property and effects in expectancy should fall in and become vested interests to his children. The children, at the date of the will, being entitled to no contingent interests, the court refused to admit evidence offered for the purpose of showing that the testator referred to expectations from particular individuals, which had been afterwards realized, as being in effect to add to the will, and not to explain it. *King v. Badley*, 417

13. Where a testator directs that his debts and funeral expenses are to be paid by his executors, it is *prima facie* to be considered that he means the payment to be made by them out of the funds which come to their hands as executors. Whether he intends that all property, which he gives to his executors, shall be subject to the payment of his debts and legacies, must be gathered from the whole will. *Wasse v. Heslington*, 495

14. Where the testator directs a sale with all convenient speed after his death, and directs the produce to be invested and the dividends to be paid to one for life, and the land remains unsold, the court considers twelve months as a reasonable time within which the estates ought to have been sold, and the produce invested, and will give to the tenant for life the rents of the unsold estate from that time. *Vickers v. Scott*, 500

15. A testator bequeathed the residue of his personal estate to trustees in trust

for his daughter, and after her decease, for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the meantime; and in case any of the said children should die under twenty-one, and have one or more child or children who should survive the testator's daughter, and live to attain twenty-one, such child or children to be entitled to his or their parent's share: provided also, that in case any child or children of his daughter should die before attaining twenty-one, the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them if more than one, the issue of any deceased child or children, to stand in the place of the parent or parents; with a limitation over, provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age: Held, that the limitation over was intended to take effect only on failure of grandchildren who should survive the testator's daughter, and not live to attain twenty-one, and was, therefore, not too remote. *Trickey v. Trickey*, 560

16. A testator gave all his personal and leasehold estate to trustees upon trust to sell and dispose of the same, and convert the whole into money, and out of the moneys to arise by such sale, disposition and conversion, to pay his debts and the legacies given by his will, or which he might give by any codicil thereto. He afterwards made a codicil by which he gave to the same trustees 2,000*l.* out of his personal estate, upon trust, to distribute and pay the same for charitable purposes: Held, that the charitable legacy was not charged upon the leasehold estate, but was payable out of the testator's purely personal estate. *Wilson v. Thomas*, 579













# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

## HIGH COURT OF CHANCERY,

DURING THE TIME OF

LORD CHANCELLOR ELDON,

IN HILARY, EASTER AND TRINITY TERMS,

55 GEO. III, 1815;

WITH A FEW CASES OF AN EARLIER PERIOD.

~~~~~  
BY GEORGE COOPER, ESQ.,  
OF LINCOLN'S INN, BARRISTER AT LAW.  
~~~~~

NEW YORK:  
BANKS, GOULD & CO., 144 NASSAU STREET.

ALBANY:  
GOULD, BANKS & CO., 475 BROADWAY.

1854.



## PREFACE.

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THE object of the Author, in taking these Notes, has been information in the pursuit of his profession. Though induced to believe that by an early communication of them to the other members of the profession, he should be doing what might be acceptable, yet he should never have thought of printing them, if he had not been fully assured that it would not be considered as in the least intended to enter into any competition with Mr. VESSEY. Indeed his scruples upon that head were first quite removed by that gentleman stepping forward, and in a most friendly manner himself urging this publication.

It will be seen that a very few cases are prefixed, which were determined prior to Hilary Term, 1815 (the period from which these Notes begin in a regular series by the Terms), and which, therefore, are an exception to what is before observed with respect to early publication; but being very few in number, selected out of a great body of Notes taken by the Author since LORD ELDON first received the Great Seal, they do not interfere with the general nature of the work; and it is hoped that some of them at least will be favorably received.

The Author cannot, while thus shortly speaking of himself, conclude, without expressing his thanks and gratitude to the

learned Lord at the head of the profession, for his very encouraging kindness to him. To the Chancery Bar, and especially to some of his more particular friends at it, whom he would be proud to name, did he not know that their delicacy would take the alarm at it, he has to acknowledge much valuable assistance in this Work, and a liberal communication from all notes and Papers.

LINCOLN'S INN OLD SQUARE,  
17<sup>th</sup> July, 1815.

# ADVERTISEMENT

WITH THE SECOND PART.

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THE Author of these Notes having, since the taking of them, been appointed to a judicial situation in India, this second and last Part is now given to the Profession with an Index to the whole, completing thereby a volume.

No possible disadvantage can, it is presumed, be suffered by thus concluding the present undertaking ; the task of continuing the Reports of the Court of Chancery, from the period at which this work closes, having, it is understood, fallen into the hands of a gentleman of that bar,\* every way qualified to ensure to the profession a quick and able execution of what he has engaged in.

Michaelmas Term, 1815.

\*John Hermann Merivale, of Lincoln's Inn, Esq.



LORD ELDON, - - - - - *Lord High Chancellor.*

SIR WILLIAM GRANT, - - - - - *Master of the Rolls.*

SIR THOMAS PLUMER, - - - - - *Vice-Chancellor.*

SIR WILLIAM GARROW, - - - - - *Attorney-General.*

SIR SAMUEL SHEPHERD, - - - - - *Solicitor-General.*





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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF CHANCERY,

BETWEEN

31 GEO. III, 1792, AND 54 GEO. III, 1814.

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WHITING v. WHITE.(a)

Before Sir R. P. ARDEN, Master of the Rolls. ROLLS.—1792: 18th July.  
Bill to redeem after twenty years, upon parol evidence of conversation with the mortgagee, dismissed.

THE plaintiff, by his bill, stated himself to be the grandson and heir at law of Simon Whiting, who, in 1751, mortgaged certain premises to one Barnaby Gibson, under whom the defendant claimed, and prayed a redemption, and the defendant and her ancestors having been in possession, it prayed also an account of the rents and profits.

The defendant, Mary White, by her answer, insisted that as to part of the premises demanded by the bill, they were not in mortgage at all, and never had been the property of Simon Whiting, the plaintiff's grandfather. As to the rest, she stated from deeds and muniments in her possession, that Simon Whiting, on the 17th March, 1746, mortgaged to one Trotman by \*demising for one thousand years; that on the [\*2]

(a) I have been favored with this note of Master Alexander, and its date and value have induced me to place it here.

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1792.—Whiting v. White.

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10th June, 1751, by agreement between Whiting and Barnaby Gibson, Whiting agreed to mortgage to Gibson the tenement in mortgage to Trotman, and to pay Trotman off; that accordingly by indenture, dated 6th July, 1751, for the considerations therein mentioned, Trotman and Whiting assigned the above term of one thousand years to Barnaby Gibson, subject to redemption on repayment of 58*l.* 16*s.* upon the 6th July, 1752.

With respect to the other part of the premises which was copyhold, she stated that Whiting, by surrender dated the 27th July, 1748, surrendered them to one Henry Bacon, with a condition that if Whiting should pay to Bacon the sum of 94*l.* 10*s.* on the 27th July, 1749, the surrender should be void, otherwise to remain in full force. That Whiting, by the agreement above stated, of the 10th June, 1751, agreed with Gibson to surrender the same copyhold to him, to secure 100*l.* with interest, paying off Bacon. That accordingly Bacon, on the 22d June, 1751, in consideration of 103*l.* 2*s.* authorized the steward of the manor to enter satisfaction upon the court rolls; and on the same 22d day of June, 1751, Whiting surrendered to Barnaby Gibson in fee, with a condition of redemption.

That Gibson some time prior to 1758, entered into possession of all these premises, because by his will, dated 28th April, 1758, he devised to his nephew, James White, a messuage and farm, to hold to him and his heirs forever, having surrendered the copyhold to the use of his will, which messuage and farm were the above mortgaged premises. That Gibson died in the latter end of the year 1758, upon which James White entered and possessed, and was admitted to the copyhold premises, and [\*3] died in 1772, intestate, leaving the defendant, \*Mary White, his only child, upon which she entered and was admitted to the copyhold, on the 20th July, 1773.

She then stated that Barnaby Gibson, from the year 1758, and James White and herself, having all along been in quiet possession, and Whiting having upon the plaintiff's own showing died

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1792.—Whiting v. White.

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in the year 1760, and the plaintiff having also upon his own showing attained twenty-one, about twelve years before exhibiting his bill; she upon the whole insisted that the right of redemption was barred by length of time.

On the part of the defendant the several instruments stated in the answer were produced, and Gibson's possession for two or three years, previous to his death, was also proved.

On the part of the plaintiff it was proved that he was the heir at law of Samuel Whiting. As to the redemption, one Roberts swore, that in 1778, the plaintiff was his apprentice; that in August, in that year, he went with Mr. King, his attorney, to defendant, and informed her that he waited on her to redeem the mortgage, when she informed him that she had no objection to give up the mortgage provided he could show a good title to redeem, and would pay principal and interest. Then the deposition went on to state, "That Mr. King, the deponent's attorney, finding defendant unwilling to be redeemed, dissuaded plaintiff, who was the apprentice to deponent, and had three years to serve, to desist from pressing his claim, till he was in a situation to do so." The witness further stated, that about the middle of the year 1789, he went with plaintiff and one Mr. Watts, and told her he had been informed she had an estate to sell, to which she replied she had, and \*the plaintiff informed her [\*4] his name was Whiting; and believed she held the said premises by virtue of some mortgage, and she then owned there was a mortgage or mortgages thereon. He further said, that he then offered to give her a draft for the principal and interest, if she would give up possession of the premises; but defendant said she did not choose to give up the estate. She refused to show the writings. He told her that he should be obliged to file a bill in Chancery against her.

Anthony Watts, the person named in the last deposition, swore, that at the conversation in July, 1789, she, the defendant, confessed she was mortgagee of the premises in Offton, and that

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1792.—Whiting v. White.

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when Roberts applied to her to redeem, she said she would consult her friends, and the plaintiff then threatened her with a bill in Chancery,

King, the attorney, said to be present at the conversation in 1778, was not examined.

The bill was filed on the 27th August, 1789.

On the 18th July, 1792, his Honor gave judgment.

The substance of his Honor's opinion was, that it appeared from the cases that there should be no redemption after a possession of twenty years. But that there was an exception to this rule, where the mortgagee in possession by any solemn act shows it to be a mortgage, such as by receiving interest, by stating an account, by treating it in any will or deed as a mortgage. He stated the cases in which redemptions had been decreed, and showed that they were all cases in which the mortgagee [\*5] had in some solemn act in writing, clearly \*and unequivocally and deliberately considered himself as mortgagee, and subject to redemption. There was only one case of parol testimony, namely, *Perry v. Marston*.<sup>(a)</sup> There Lord Kenyon received parol testimony and decreed a redemption. The decree was reversed by Lord Thurlow. His Honor said, "I have looked into the record of that case and seen the depositions." He then stated particularly the circumstances of that case.

What Mr. Brown stated, he said, was true; but that he had not stated all.<sup>(b)</sup>

It appeared from his Honor's statement, that the real question in the cause ought to have been, whether it was or was not a

(a) 2 Bro. Rep. 397.

(b) See the further material evidence in this case taken from the Register's book, by the Vice-Chancellor, introduced into a note to the case of *Reeks v. Postlethwaite*, *post*.

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1792.—Whiting v. White.

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mortgage? whether the trust to which, by the last surrender to Marston, that surrender to Marston was made subject, was a proviso of redemption? And he stated strong circumstances to show that it was not the proviso of redemption. His answer was sworn on the 24th May, 1780, by which he himself swore that he was not mortgagee, and insisted upon his title, and five or six witnesses swear, that in June, 1780, or about that time, he said that he had kept accounts as mortgagee, and that he was willing to be redeemed. All this a few months after he had himself sworn that he was not a mortgagee, and would not be redeemed. This, his Honor said, was sufficient to show the danger of parol evidence. Lord Kenyon, however, admitted it and acted upon it. This, therefore, is the opinion of a learned judge, that such evidence is admissible. The decree, however, was reversed by Lord Thurlow, and, \*I think, properly, because he did not think that [\*6] there was any mortgage at all, but that Marston had an absolute title.

“I will not lay it down in this case, that no parol evidence shall ever be admitted, because this case does not call for it, though I should be glad to find it so ruled, and the case of *Perry v. Marston* itself is strong evidence of the wisdom of the Statute of Frauds. But thus much I will say, that if such evidence be admitted, it ought to be clear, unequivocal, and to show a deliberate intention of giving a redemption, which is not the case here.”

He observed that King, the attorney, was not examined, that even the first conversation in its result showed that the defendant was not willing to be redeemed, and by the record it was expressly sworn so.

He dismissed the bill, but without costs.(a)

(a) See *Reeks v. Postlethwaite* and *Baron v. Martin*, *post*.

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1801.—Wilkes v. Steward.

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## MARY WILKES v. JOHN STEWARD.

Rolls.—1801: 17th November.

Executors cannot lend money on personal security, though words which may imply a discretion so to do, are used by the testator.

THIS was a bill against the defendants as executor and executrix of S. Hurtle, for an account; and to have a legacy of 1,000*l.* secured to them, and for such purpose paid into court upon the trusts of the will.

The defendants, by their answer, stated that by the will they were empowered either to lay out the legacy in the funds, [\*7] “*or on such other good security, as they could procure and think safe,*” and that they had invested the money upon good security, or such as they think safe: they admitted that the plaintiff, Mary Wilkes, was entitled to the interest for her life, and that after her death, the principal was to be divided amongst all the children living at that time: but they said that in case Mary Wilkes left no children living at her death, then, and in that case, the testator had given the said 1,000*l.* to the defendant, Mary Steward, and her grandson Samuel Smith, equally to be divided between them, and the issue of their bodies, and *in default of issue* of the said Samuel Smith, then the whole to the defendant, Mary Steward. The defendants also admitted that the other plaintiff, Elizabeth Wilkes, was the only daughter of the plaintiff Mary Wilkes, who had lived to attain the age of twenty-one; and they submitted to account if necessary.

The cause was heard on bill and answer.

Mr. Lloyd and Mr. Wingfield, for the plaintiffs, argued that the plaintiffs were entitled to have the security of the court; that the defendants had acted uncandidly in not stating upon what security they had laid out the money; that they had, it was fair to suppose, kept the money in their own hands, and

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1801.—*Wilkes v. Steward*.

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were therefore guilty of a breach of trust for which they were answerable.

Mr. *Richards* and Mr. *Cooper*, for the defendants, contended that the testator had given them a discretion to lay out the money as they should think proper; that they had sworn by their answer that they *had laid it out* upon good security, and exercised the best judgment they could upon the subject; that the plaintiffs could not, therefore, infer that they, the defendants, had retained it in their own hands; that they being entitled \*to the legacy in the event of the plaintiff, Mary [\*8] *Wilkes*, dying without children living at her death, were interested in seeing that the money was lent upon good and sufficient security, that the reason why the defendants had not stated what security they had taken was, because they had not been asked, there being no interrogatory in the bill to that effect; and that the plaintiffs, by not replying to the answer, had shut the defendants out from proving in evidence the fact sworn to in the answer, of their having laid out the 1,000*l.* upon good security; that they were not tied down to the alternative of laying it out in the funds, or upon real security; and that even supposing they had laid it out upon bond, that they were justified in so doing by the discretionary power given them by the will.

THE MASTER OF THE ROLLS (Sir William Grant):—was clearly of opinion that the defendants had no power to lay out the money upon personal security; that it was like trustees to sell who could not be justified in selling for any other price than the best price that could be got for the property; and that the plaintiffs were fully entitled to the security of the court.

It was accordingly referred to the Master to inquire and state to the court, upon what security the defendants had laid out the money.

*N. B.* The executors had, in fact, lent the money upon bond.

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1802.—*Bromley v. Holland, Tyrrell and Oakden.*

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[\*9] \*BROMLEY v. HOLLAND, TYRRELL AND OAKDEN.

LINCOLN'S INN HALL—1802: 15th, 16th and 17th March; 7th May.

The Court of Chancery has jurisdiction, even after the grantor of an annuity has twice failed at law in his attempts to set aside the annuity, to declare it void and order the securities to be delivered up, and the payments of the annuity from the date of it to be deducted from the consideration paid for it. The price paid by the grantee, and not that by the assignee, is to be taken in the account.

The decree at the Rolls, directing the account of payments made by the grantor, only from the bill filed, was reversed. S. C., 7 Term Rep. 455.; 5 Ves. 610; 7 Ves. 3.

If the trustee of a term to secure the payment of an annuity assigns the term to a third person, such third person should be a party to a suit to have the securities delivered up, as void.

Questionable whether the summary jurisdiction over property given by the Annuity Act, is not unconstitutional.

If grantee of an annuity voluntarily destroyed his deeds to conceal their defects, and sued upon the memorial at law, a court of equity would take cognizance of the case.

THIS was an appeal from a decree of Lord Alvanley, the late Master of the Rolls, by which the securities for an annuity, granted by the plaintiff, were, under the circumstances, decreed to be delivered up, upon the terms of the plaintiff paying the whole consideration money paid for the assignment of it, by the defendant Holland from Thomas Peacock, to whom Samuel Greatheed, the original grantee, had assigned it. The petition of appeal prayed that the payments which had been made of the annuity, since the original grant of it in 1788, might be allowed the plaintiff in account, and deducted from the consideration paid for the assignment.

The material facts of the case were as follows: The grant of the annuity was by deed of the 16th May, 1788, between the plaintiff of the first part, Samuel Greatheed of the second part, and the defendant Tyrrell of the third part, whereby, in consideration of 600*l.* paid by Greatheed, the plaintiff granted an annuity of 100*l.* a year, for the life of plaintiff, and he thereby also demised to the defendant Tyrrell, for the term of ninety-nine



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- 1802.—*Bromley v. Holland, Tyrrell and Oakden.*

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years, if ~~he~~ Bromley, should so long live, the tithes of the united rectories of St. Mildred and St. Mary Colechurch, London, for securing the payment of the said annuity; and the plaintiff also executed a bond and warrant of attorney to confess judgment thereon, as further securities for the said annuity. By indenture \*of the 2d April, 1792, Greatheed sold and [\*10] assigned the said annuity with the said securities to Peacock, and thereupon the defendant Tyrrell assigned his interest in the said term to Thomas Flashman, as a trustee for Peacock. By indenture of the 17th February, 1795, Peacock assigned the annuity and securities to the defendant Holland; but Flashman remained trustee of the term. The plaintiff, in Hilary Term, 1794, applied to the Court of King's Bench to set aside the said annuity, upon objections not material now to state, and obtained a rule for that purpose, which rule, however, was afterwards discharged with costs.

The annuity afterwards becoming in arrear, and the plaintiff being pressed for payment, executed a further indenture of the 1st June, 1795, whereby he, the said Bromley, authorized and empowered the defendant Oakden (who was then in possession of the tithes and profits of the said united rectories, under and by virtue of a demise thereof to the said Oakden, of the 20th June, 1794, for the better securing of another annuity of 50*l.* a year, for the life of plaintiff to one Ralph Oakden), to pay and apply the residue of such rents and profits, after satisfying the said annuity of 50*l.* to Ralph Oakden, in payment of the annuity of the defendant Holland. In Michaelmas Term, 1798, the plaintiff again applied to the Court of King's Bench to set aside the said annuity; but which rule was also discharged upon discussion, inasmuch as the court refused to entertain a second application between the same parties, on the same state of facts, though grounded upon a new objection to the annuity, which was not before urged or considered. See the case under the name of *Greatheed v. Bromley*, in Durnford and East's Reports, vol. vii. p. 455. The plaintiff, on the 18th June, 1798, having thus twice failed at law, filed his bill in Chancery for relief, and on

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1802.—*Bromley v. Holland, Tyrrell and Oakden.*

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[\*11] \*the 4th July, 1800, the above decree was made at the Rolls, against which the plaintiff now appealed.

The *Solicitor-General*(a) for the plaintiff:—The clause of redemption contained in the grant of this annuity, not being stated in the memorial, the annuity is clearly void, and it is unnecessary to state other objections. The only question then being as to the extent of the relief to be now given, the cases of *Byne v. Vivian*(b) and *Byne v. Potter*(c) show that the account must be taken from the date of the annuity. The only particular circumstances of this case to distinguish it from others, are the two assignments; first to Peacock, and afterwards to the defendant Holland, and the plaintiff's conveyance of the 1st June, 1795, to the defendant Oakden, as a trustee to pay the annuity. But as to the assignments, an assignee is not entitled to more favor than the original grantee, otherwise the statute might be evaded by assignments. As to the assignment to Oakden, the plaintiff only consented to it to prevent an execution. His Honor was of opinion that the plaintiff, in this case, was only entitled to the benefit of the clause of redemption; but the bill does not pray a redemption, and no case has stopped short with giving that relief. *Howson v. Hancock*(d) differs from this case upon the principle stated by Lord Mansfield in *Smith v. Bromley*(e). This is a case of oppression, not *delictum*.

Mr. *Piggott*:—This decree treats the contract as a valid [\*12] and subsisting one, containing a clause of \*redemption, and gives relief under that clause, but no further; whereas the contract is void. The defendant not having refused to allow a redemption, the bill to redeem was unnecessary, and if it is to be considered as such, it ought to have been dismissed. As to the assignments of the annuity, the plaintiff was no party to either of them, and with regard to the assignment to the trustee Oakden, that assignment gives jurisdiction to this court, and

(a) The Honorable Spencer Perceval.

(b) 5 Ves. 604.

(c) 5 Ves. 609.

(d) 8 Durnf. and East, 575.

(e) Doug. 670, note.

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the plaintiff must, in consequence of it, come here to disentangle his property from the trusts of that deed. He cannot have relief at law, because courts of law have jurisdiction to set aside the securities only in the four cases specified in the act,<sup>(a)</sup> of which this is not one.

Mr. *Leach* :—The deed being void in this case, the only question is whether the court has relieved according to its rules. Now there is no case, but the present, where the parties have not been put into the same situation. This decree must have proceeded upon a confusion between the cases of deeds voidable and of those void *ab initio*. The deed of 1st June, 1795, cannot be considered a confirmation of the annuity by the plaintiff: for how can a deed, creating a mode of payment, be more a confirmation than a payment itself? Besides a void deed cannot be confirmed.

Mr. *Mansfield* for the defendants Holland and Tyrrell :—There are two questions in this case: 1st. Whether any decree at all ought to have been made? 2d. Supposing there ought, whether the relief given is not sufficient? As to the first, I consider the defendants entitled \*to raise that [\*13] question, although they have not presented any cross petition of appeal. This court has no jurisdiction to order deeds which are void at law to be delivered up, such relief being unnecessary where the instruments cannot be made use of against you. *Franco v. Bolton*.<sup>(b)</sup> The contrary cases of *Byne v. Vivian* and *Byne v. Potter*, are not warranted by any previous authority, and are irreconcilable with each other. The present case affords particular grounds to induce this court not to interfere: that it has been twice before the Court of King's Bench, and is *res judicata*, and has besides been confirmed by the plaintiff's own deed, subsequent thereto of the 1st June, 1795. 2d. As to the terms, I consider the payments made as of an annuity, which the grantor chooses should subsist. Where is the honesty of the plaintiff going on paying the annuity as long as he finds

(a) 17 Geo. III, c. 26, s. 4.

(b) 3 Ves. 368.

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1802.—*Bromley v. Holland, Tyrrell and Oakden.*


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it beneficial, all the time taking his chance of the life dropping, and when the advantage is against him, by the purchaser having received back again as much as his principal money and interest, in then stopping the payments, and insisting on a flaw? The grantee during this time is living up to his income, deceived by the grantor with the notion that the annuity is valid, confirmed by the payments being continued. These payments being voluntary cannot be got back, no action could recover them. There is besides in this case a want of parties, the legal estate not being in Tyrrell, but in Flashman, who is not before the court.

*Mr. Richards*.—The court has no jurisdiction to order these instruments to be delivered up, which principle is settled by Lord Thurlow, in *Ryan v. Mackmath*,<sup>(a)</sup> and by the sub-  
[\*14] sequent case of *Franco v. Bolton*. But at all events the payments cannot be recalled because the plaintiff has availed himself of the grantee's dishonesty, if it is such, by letting him run all the risk.

*Mr. Cooper*.—The proposition that upon this petition of the plaintiff the whole case is open to the defendant, is clear by the terms of the prayer of the petition, which are, that the plaintiff "appeals from the said decree" generally; by the case of *Rawlins v. Powell*,<sup>(b)</sup> where it is laid down that upon a plaintiff's petitioning to rehear, the cause is open as to the whole and every part of it with respect to the defendant, while in relation to the plaintiffs it is only open as to those parts of it complained of in the petition; and by the subsequent practice. The defendant, therefore, has a right to contend that this court cannot take cognizance of the case after two decisions at law, although there might be a distinction probably upon the question, whether the grantor was thereby precluded from defending attempts made by the grantee to enforce payment of the annuity. But here the application is made by the grantor to set aside the annuity, after he has so twice failed in the other court. Nor can the deed of trust of the 1st June, 1795, give this court jurisdiction, the

(a) 3 Brown's Rep. in Ch. 15.

(b) 1 P. Wms. 300.

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 1802.—*Bromley v. Holland, Tyrrell and Oakden.*


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trustee of it not being before the court, and the object of the suit not being to compel him to account. Lord Kenyon's judgment upon this case, when brought before him the second time, founded upon the notion that the matter must be taken to have passed in *rem judicatam*, it appears that he afterwards upon mature consideration approved of, for in the case of *Schumann v. Weatherhead*,<sup>(a)</sup> he refers to this case and his decision upon it, which he recognizes and again acts upon. This case, when before Lord Kenyon the second time, is an instance of a second application in the same \*court being refused; but in *Hart v. Lovelace*<sup>(b)</sup> the court went a step further, and held, that if the validity of an annuity has once come in judgment before a court of competent jurisdiction, no other court will suffer the same objection to be stirred again. The present bill filed was then a species of appeal from decisions at law to a court of equity, against a purchaser with the law in his favor, and upon mere legal objections. For this there is no authority; for in *Byne v. Vivian* and *Byne v. Potter*, there had been no previous application at law, nor had there been any confirmation of the annuity by subsequent deed, which instrument did not merely create a mode of paying the annuity, but was adding to the securities of the annuity an instrument which could not be invalidated, because not necessary to be memorialized, being subsequent. In *Ex parte Maxwell*,<sup>(c)</sup> where an annuity had been paid about four years, and the grantee was dead, the court refused to permit the consideration to be questioned, and doubted whether it could be done after six years, by analogy to the Statute of Limitations. In the present case the grantee is out of the case, having assigned, and is not made a party to the suit, and fourteen years have elapsed. Secondly, at all events the plaintiff ought not to be allowed an account of payments before filing the bill. This is in the nature of *assumpsit* to recover back those payments. How would it be at law? The contract in question is a contract of risk, in which the risk has been run, and that being so, though the contract may be void at law, the money paid can never be

(a) 1 East, 537.

(c) 2 East. 85.

(b) 6 Term Rep. 471.

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recovered back. If money has been paid on an illegal contract of insurance, or *bottomry* and *respondentia*, the risk having been run, it shall not be recovered back. *Lowry v. Bourdieu*,<sup>(a)</sup>  
 [\*16] \**Andree v. Fletcher*,<sup>(b)</sup> *Munt v. Stokes*,<sup>(c)</sup> and *Cotton v.*

*Thurland*,<sup>(d)</sup> the distinction being between contracts executed and executory; and if you want to rescind the contract you must do it while the contract remains executory. Here the risk has been run, and the payments made, and therefore cannot be recovered; indeed payments in general, according to justice and good conscience, though they could not have been enforced, cannot be recalled at law; as upon a bill of exchange not stamped, or of a debt barred by infancy or the Statute of Limitations, put by Lord Mansfield in *Bize v. Dickson*<sup>(e)</sup> of a bond with a defect. It is, therefore, not true that the court will rescind where it will not enforce, or that payment under a void security cannot be supported. *Howson v. Hancock*<sup>(g)</sup> was still stronger, where money deposited upon an illegal wager was paid to the winner by the stakeholder with the consent of the loser, it was held that the loser could not afterwards recover them back. If this is so at law, how is it in equity? This is not a case of usury, fraud or surprise; there is nothing in the original terms to vitiate the bargain, the defect is not in substance but in a collateral matter, and the contract has been deliberately confirmed by the plaintiff. If, therefore, equity relieves at all, it should be upon the terms of not so far undoing the original transaction as to make the defendant refund without further grounds than appear in this case.

The *Solicitor-General*, in reply, conceded to the defendants the point made, that it was competent to them upon the  
 [\*17] plaintiff's appeal against \*the sufficiency of the relief to contend that no decree at all ought to have been made. But he relied upon the cases of *Byne v. Vivian* and *Byne v. Potter*, as showing that the court would grant some relief to the plaintiff, at least to the extent of ordering the securities to be de-

(a) Doug. 451.

(b) 9 Term Rep. 266.

(c) 4 Term Rep. 561.

(d) 5 Term Rep. 405.

(e) 1 Term Rep. 286.

(g) 8 Term Rep. 575.

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livered up. Those securities being unquestionably void, they ought not to be permitted to remain in the defendant's hands, upon the principle *quia timet*, it being possible that an action might hereafter be brought upon them, as by the defendants alleging their loss, in order that the defects upon them might not appear; or upon the judgment, as at all events the judgment cannot be got rid of unless by the interposition of this court. Upon the other point, as to the insufficiency of the relief, the plaintiff insists, that the contract being void, *ab initio*, the money paid with interest on the one hand, and the payments of the annuity on the other, must be taken into account, and the one set off against the other. Nor can those payments be considered any more as voluntary than the payment of the consideration; or than those made in the cases of usury: nor can the relief given in cases of usury be different from that to be granted in the present case. But, in truth, the payments are not voluntary, but made by mistake, under the idea of the annuity being valid, such notion being confirmed in the present case by the result of the proceedings at law. The cases of illegal contracts executed, where the payment has been made, proceed upon this principle, that each party being alike *particeps criminis*, the maxim applies of *portior est conditio defendentis*; whereas the Annuity Act was intended to relieve the needy against usurers and money-lenders. Executory contracts, where the money may be recovered, are upon the principle that the plaintiff chooses in proper time to disaffirm the contract, by which he frees himself from the imputation of criminality. Nor can the length \*of time avail in this case. Lord Kenyon's allusion to [\*18] the Statute of Limitations in *Ex parte Maxwell* is a mere dictum, quite impossible to be supported.

LORD CHANCELLOR ELDON:—This cause comes on upon the petition of appeal of the plaintiff. The petition states the grant of the annuity by deed, dated the 16th May, 1788, accompanied by bond and warrant of attorney: the assignment, dated the 2d April, 1792, by Greateed to Peacock; and the assignment, dated the 17th February, 1795, by Peacock to Holland; and

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the deed, executed by the plaintiff, dated the 1st June, 1795, to Oakden; and prays to have the said deeds and instruments delivered up, and to have credit for the several payments made by him on account of the annuity since the granting thereof, as against the consideration money and legal interest thereon. The answer to the original bill states, that on the assignment of the annuity to Peacock, the defendant Tyrrell assigned all his right and interest to Flashman. It appears then, that Tyrrell has no estate, even apparent, which could call for him to be a party; and it is objected that Flashman is a necessary party, and not before the court. The answer given to this is, that if the conveyance to Tyrrell was void, he conveyed nothing to Flashman. On the other hand the difficulty arises, that as the annuity is good at law, Flashman must have the legal estate in the term. The plaintiff, therefore, may find it necessary hereafter, in order to clear his title, to have a reconveyance of the legal estate from Flashman, and he being only a trustee for Holland, the latter must be a party to such second suit, and so is liable to double vexation by a second suit from the circumstance of Flashman not being a party to the present one. I am, therefore, not sure that if the objection \*for want of [\*19] parties was insisted on, that I could relieve the plaintiff from it. Tyrrell might have disclaimed in three lines, and there was no necessity to bring it to a hearing; but I very much question whether Flashman should not.

I cannot agree with Lord Alvanley, that this is a suit to redeem the annuity; but I think it a suit asking for a decree upon equitable grounds, if any such there are, and in a case in which the court is bound to state that there never was any legally existing annuity which could be redeemed.

Upon the first question which arises in this cause, that is, as to the jurisdiction, the Annuity Act has produced this singular state of circumstances, that although this annuity is good for nothing, yet the Court of King's Bench have twice refused to act upon that invalidity; and this unseemly incongruity also



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appears, that if a question arose in any other court upon the rights of the parties on these instruments, every other court must say the grantee has no right. There might, however, have been want of proper evidence when the applications were made to the Court of King's Bench, and the contents within the four corners of the deed granting this annuity could not have been looked at, with the memorial of the same. If money had been levied under the judgment, I think that court must see great difficulty how the party could hold the money under such a judgment. I lay the applications to the Court of King's Bench out of the case. I think the securities are void at law, and having no doubt upon that point, think it unnecessary to send the case to law; and should also think it disrespectful to the Court of King's Bench to send it there a third time.

\*The next consideration is, whether equity has juris- [\*20] diction to order void securities to be delivered up. If that were *res integra*, I should have great doubt about it, from the powerful argument of Mr. Mansfield in *Byne v. Vivian*. But that question appears to have been three times decided by Lord Rosslyn and Lord Alvanley, that this court has jurisdiction, so that a jurisdiction has been exercised in four decisions.

The legislature in the Annuity Act has declared the practice of lending money in that way is pernicious; the mischief is not to public but to individual interests. The ground of its being pernicious is thought to be the secrecy with which such transactions are generally carried on, and the statute accordingly provides remedies to the evil arising from that secrecy. Whether those provisions are wise, I stay not here to consider; but must deem them to be so. I make these remarks because it has been strongly urged, that in this case there has been no circumvention, which argument is not as admissable as it is strongly put, because the legislature having characterized the nature of the transaction, and the mischiefs to be redressed arising from secrecy, this case is not to be decided merely as between the individuals on this record, but as the act directs, between all persons what-

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soever dealing in annuities. If this act is objectionable, I think that it is most so upon the ground that the summary jurisdiction given by it over property is inconsistent with the policy of the law and constitution of this country. That this court has inherent in it power to give further relief than the act has given it, would be doubtful if *res integra* be a grave question; but now on the best consideration I can give, I think it has that power, and I not only hesitate in acceding to Lord Rosslyn's opinion in *Franco v. Bolton*, but actually do not concur in it; there is an ancient jurisdiction in this court in putting on [\*21] \*a record other considerations than appear in a deed, and such jurisdiction may be necessary to be upheld in this sort of case: suppose the grantee of the annuity chose to throw his deed into the fire, and say there was no clause of redemption in it, could he sue upon the memorial? The dispensing with a *profert* at law might enable him: but this court would interfere. There is also an ancient jurisdiction in this court to order bills, policies of assurance and annuity deeds to be delivered up; the same too is always prayed in policy causes in the Exchequer: and it is a wholesome jurisdiction to order void instruments to be delivered up, upon which vexatious demands might afterwards be made.

In the discussion of this case at the Rolls, and since here, a good deal has been said upon the case of payment of an unstamped note of hand, or bill of exchange, in which the payment cannot be recovered back, and which it has been thought furnishes an analogy for the present case. But it seems to me that there may be a considerable difference between securities of that sort, which upon the face of them can create no demand, and the case of a deed of grant of an annuity which upon the face of it purports to affect real property. The late Attorney-General, in arguing *Byne v. Vivian* and *Byne v. Potter*, seems also to have relied a good deal too upon the circumstance of such an instrument forming a cloud upon the title of an estate, and it is certain, if the party is permitted to keep such a deed, he might by the production of it some time hereafter defeat the ends of jus-

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1802.—*Bromley v. Holland, Tyrrell and Oakden.*

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tice, the opposite party not being able immediately to prove the circumstances *dehors* the instrument which makes it invalid. There was one case in the King's Bench in which the power of granting an annuity out of a rectory was questioned upon an old statute; but suppose the present annuity had been \*secured upon a life interest in lay property, and the [\*22] grantor brought an ejectment, the outstanding term might be produced by surprise to defeat that action, and the lessor of the plaintiff, as is often the case, not being ready to meet such evidence by the necessary proof, a dishonest use would thus be made of the term to prevent a recovery according to the right. That being so, and this court having exercised jurisdiction in the cases which I have before referred to, if those cases are thought wrong the reversal of them should be elsewhere.

Upon the other material question as to the terms, if the matter were *res integra*, I should have great doubt. The objection has always appeared to me to be unanswerable, in a moral point of view, that it was inconsistent with the conduct of an honest man taking an annuity, and paying it as such as long as it is beneficial to him, and when it is no longer so, then turning round and insisting in a court of justice that what he has so long paid as an annuity has been nothing but a repayment of the consideration with interest. Upon the maxim "*quod dubitas ne feceris*," I should not have done so. But sitting here in a court of justice, I must not decide the case in a moral point of view. Courts of law, within my recollection, in deciding upon the sound principle that payments voluntarily made shall not be recovered back, would not, upon an annuity being set aside, allow the payments to be deducted from the consideration. The idea could not be endured, that if the grantee died at the end of the first year, it should be considered as an annuity in favor of the grantor, from whom none of the consideration should be recalled; but that at the end of five or six years, when the grantor had paid as much as the consideration with interest, that he might then insist that what he has paid as annuity was not such, \*but merely consideration money paid back by [\*23]

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 1802.—*Bromley v. Holland, Tyrrell and Oakden.*


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instalments. But courts of law undoubtedly hold at this day, that when an action is brought to recover the consideration money given for an annuity, which has been set aside, the defendant shall be allowed to deduct the payments made under the annuity. It has been so decided at law, and also by Lord Rosslyn, sitting in a court of equity. Accounting, in this sort of case, is, indeed, a pure matter of law. Lord Alvanley also seems to have acceded to the right of calling for an account in equity; but to have taken it up from the filing of the bill, instead of from the commencement of the transaction. He did so, upon the principle that this was a case for redemption, which pre-supposes the annuity deed to be valid, in which the clause of redemption is contained; whereas I am at a loss to conceive how a decree is to be founded upon a clause of redemption contained in a deed, which deed must be admitted to be null and void to all intents and purposes. In administering the relief then as between grantor and grantee, I have difficulty in this, as to what is to be done with any surplus that may be in the grantee's hands: it is said, that being voluntary payments they shall not be recovered back. Is this upon any principle arising out of the policy of the act? If it is not so, it seems to me difficult upon legal principles to find the distinction in favor of the right of recovering back payments in one case, and against it in the other. But the difficulty has occurred in equity, in the case of *Byne v. Potter*, in which there actually was a surplus in the hands of the grantee, but the court did not order it to be repaid; but the defendant admitting that he had received more than was due to him for principal and interest, the decree merely was, that the securities should be delivered up to be cancelled.

How is the case then as between the grantor and the [\*24] assignee? I think he stands in the place of the grantee, and, as such, is entitled to the full sum of 600*l.*, the original consideration paid for the annuity. The judgment at law, by the defendant Holland, must be in the name of Greatheed; so in this court if any proceeding is directed to be had upon the bond; so at law upon the covenant. In equity the assignee is

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1802.—Bromley v. Holland, Tyrrell and Oakden.

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entitled to these rights, and I think it cannot be contended that there is any substantial difference between the grantee and the assignee. I think, that even at law, the original consideration, and not that of the assignment, must be taken to be the footing of the account, so that if this annuity had been set aside upon a third application, the account must have been taken upon what Greateed paid to Bromley, as the price of the annuity, and not upon what his assignee paid to him. Therefore, if the assignee paid more he could only have the original consideration allowed him: and which case might happen: for an annuity might be assigned for more money than it originally cost, from the circumstance of the grantor having become healthier and stronger by the time when the annuity was assigned, than he was when he originally granted the annuity.

As to the confirmation there is nothing in that objection; the grantor had no notice of the defects; and I do not see how a deed, which is null and void, is capable of confirmation.

I am, therefore, clearly of opinion that the decree at the Rolls is wrong; that the account must be taken of all payments made of the annuity from the original grant of it, instead of from the filing of the bill; this not being a case for relief upon the principle of redemption as reserved by the deed, but upon the principle of the deed being void to all intents and purposes, \*and consequently that there never was an annuity ca- [\*25] pable of being redeemed. The defendant Tyrrell must have his costs, as unnecessarily brought to a hearing. In *Byne v. Vivian*, Lord Rosslyn gave the principal defendant his costs of the suit; but not in *Byne v. Potter*, because the defendant there admitted that the annuity had been satisfied. In cases of redemption a defendant has costs; but I doubt whether he also has in a case of usury. In the present case, which is a case of great difficulty, almost of the first occurrence, and in which I am reversing a decree made by a most respectable judge, and defended by powerful arguments, I cannot, therefore, give any costs whatever to the plaintiff. The relief, therefore, must be

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1802.—*Bromley v. Holland, Tyrrell and Oakden.*

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without costs as between the plaintiff and the defendant Holland. The other defendants Oakden and Tyrrell must have their costs; and as Oakden must account to the plaintiff for part of the rents and profits received by him in consequence of this annuity being void, I think, that even the necessity for such an account against Oakden would support the jurisdiction of the court.

His Lordship added, that this being a case of great difficulty, he would himself pen the decree; which he did, and it was as follows:

Reg. Lib. A. 1801, fol. 514.

"Let the decree, bearing date the 4th day of July, 1800, be reversed, and refer it to the Master to take an account of the consideration or considerations paid by Samuel Greatheed, on the purchase of the annuity or annuities granted to him by the plaintiff by the deed or deeds, bearing date respectively, the 16th day of May, 1788, together with interest at 5l. per cent. upon the same; and also to take an account of the payments [\*26] made by the said plaintiff, or on his behalf, upon account of such annuity or annuities to the said Samuel Greatheed, or to the order, or upon the account of any person or persons claiming under him by assignment or otherwise, including the defendant, Arabella Holland: and let such payments as the same were made from time to time be applied, first in discharge of the interest, and then of the principal of such consideration or considerations; and in case upon the taking of such account, such consideration or considerations, with interest, shall appear to have been fully repaid, let all deeds, granted for securing the said annuity or annuities, other than the deed of the 1st day of June, 1795, be delivered up to be cancelled, and let satisfaction be entered upon the record of the judgment. And the defendant, Richard Oakden, is without costs, to account with the plaintiff for, and pay to him the surplus rents of the premises comprised in the deed of the 1st day of June, 1795, after satisfaction of the payments, other than those thereby directed to be made to the said defendant, Arabella Holland; such

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1802.—*Bromley v. Holland, Tyrrell and Oakden.*

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surplus rents to be accounted for by the said defendant, Richard Oakden, from the time which it shall appear that such principal and interest as aforesaid, was satisfied as aforesaid, and from which it shall appear, that he shall have had notice of the plaintiff's claim, but not beyond the time of filing the bill. And in case anything on taking such account as aforesaid, shall appear to be remaining due from the plaintiff, then the plaintiff is to pay the same to the said defendant, Arabella Holland, as and when the Master shall appoint; and upon such payment, such deeds shall be delivered up, and such satisfaction be entered, and such payment be thenceforth made by the said defendant, Richard Oakden, as hereinbefore mentioned. And in case the \*plaintiff shall make default in such payment, [\*27] the plaintiff's bill is to be dismissed with costs, to be taxed by the Master, and to be paid to the defendant, Arabella Holland: and in either case the plaintiff is to pay unto the defendant Tyrrell, and to the defendant Oakden, their costs of this suit, to be taxed by the Master, and until such accounts are taken, and if anything shall appear to be due thereon to the said defendant, Arabella Holland, until such default of payment as aforesaid, all proceedings at law, by the defendant, Arabella Holland, either in her own name, or in the name of any other person or persons, under whom she claims, are to be stayed by injunction. And for the better taking the aforesaid accounts, the parties are to produce, before the Master, all books, papers and writings in their custody or power, relating thereto, and are to be examined upon interrogatories, as the Master shall direct, who in taking the said account is to make unto the parties all just allowances. And in case the plaintiff shall make default in such payment as aforesaid, let the sum of 10*l.*, deposited by him with the register, be paid to the said defendant, Arabella Holland; but in case the plaintiff shall not make such default, let the deposit be returned to him."

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1802.—Wakerell v. Delight and Wife.

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## WAKERELL v. DELIGHT AND WIFE.

LINCOLN'S INN HALL.—1802: 23d July.

Mortgagor applying for time after having obtained the order under 7 Geo. II, c. 20, need not have money ready as at law.

MR. CULLEN moved that the defendant, who was a mortgagor in a suit by plaintiff, the mortgagee, to foreclose, and who had petitioned and obtained an order under the Act 7 Geo. II, [\*28] c. 20, to refer it, in the first instance, to the Master, to take the account of what was due to the plaintiff, for principal, interest, and costs, on his security (the Master reporting 535*l.* to be due, and ordering it to be paid by the 25th September next), might have further time, till the 25th March, 1804, upon the usual affidavit of having endeavored in vain to sell the premises, and of their being a sufficient and ample security.

Mr. *Cooper* opposed the motion upon the ground that the court had no authority, under the Act of Parliament, in such a case to enlarge the time, the act providing for the case of mortgagors who had their principal, interest and costs, ready to pay, provided they could be relieved from the delay and expense of a suit. It declares that courts shall have power to stay the proceedings in them, upon such payment; but the payment is a condition. At all events, the defendants, after getting this short order, could never have nine months more time allowed them.

LORD CHANCELLOR at first thought the court had no authority, but afterwards changed his mind, upon looking into the act, considering that in suits of foreclosure a court of equity was enabled to make the same order, &c., as upon a formal hearing, and afterwards act the same as in cases of that sort. He therefore gave the defendants till the first day of Hilary Term, upon their undertaking to pay the interest and costs now due, and referred it back to the Master to compute subsequent interest and costs.



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1805.—*Lithgow v. Lyon, Earle and others.*

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*\*LITHGOW v. LYON, EARLE AND OTHERS.* [\*29]

ROLLS.—1805: 29th May.

Interest given on a note of hand from the time of its becoming payable.

THIS came on, upon an application by the plaintiffs, to rectify the minutes of a decree; and the question was, whether the defendants, Lyon and Earle, were entitled to interest upon a demand of 1,000*l.*, for which a promissory note of 1,000*l.* given by the plaintiffs to Langston and Gafney, had by them been indorsed to the defendants, Lyon and Earle.

It appeared that the plaintiffs had received no consideration for the note; but had deposited it with Langston and Gafney, as a security for the good conduct of a young man placed with them in a situation of trust. Langston and Gafney, being pressed by their creditors, indorsed the note to Lyon and Earle. Langston and Gafney, after indorsing the note to Lyon and Earle, wished to get it back again, and sent other bills, requesting the note to be delivered up. Lyon and Earle, doubting the goodness of the second bills, kept both. They had received sums of money upon the second set of bills, and the plaintiffs had filed their bill in this court, praying to have the note delivered up upon plaintiffs paying what the defendants had remaining due to them, in respect of their debt of 1,000*l.*

The decree directed an account to be taken of what was due in respect of the 1,000*l.* debt, and also of what the defendants, Lyon and Earle, had received; and upon plaintiffs paying what remained due in respect of the note and interest, then defendants were to deliver up the note, and assign the second set of bills, and \*their right to receive future dividends thereon, [\*30] (the parties having become bankrupts.)

Mr. *Richards* and Mr. *Agar* contended that the debt being simple contract, did not carry interest; and that the note being

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1805.—Attorney-General v. The Corporation of Carmarthen.

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afterwards deposited as a security for it, could not make it carry interest.

Mr. *Romilly* and Mr. *Cooper*:—Negotiable securities universally carry interest from the time they become due.

The Master of the Rolls directed the minutes to be altered, by ordering the Master to inquire whether the debt carried interest from the first, and if not, then to compute interest on what remained due of the debt at the time the note became payable. He said that the plaintiffs had it in their power, by taking up the note before it was due, to avoid interest; but as they did not do so, interest at that time attached, otherwise the note was of no use.

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ATTORNEY-GENERAL v. THE CORPORATION OF CARMARTHEN.

LINCOLN'S INN HALL.—1805: 19th Dec.

Information against a Corporation, stating that they were seized of real estates partly for purposes of public utility, and other part in trust for private charity; and charging a general misapplication of the funds, and praying relief accordingly: a demurrer for multifariousness was allowed.

THIS was an information stating that the corporation was seized of real estates for purposes of public utility, and [\*31] of other real estates in trust for private charity; and that the defendants had sold part of the first-mentioned estates, and were selling the remainder; and charging a general misapplication of the funds, and abuses of the charity; and praying an injunction to restrain the first, and the court's regulation of the latter.

The defendant demurred for multifariousness.

LORD CHANCELLOR:—The two things don't hang properly together. Even with regard to the misapplication of the corpo-

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 1806.—*Price v. Williams and others.*


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ration's own money, I think this court cannot interfere. I know that Mr. Justice Buller(a) thought that this court had jurisdiction in a case of a corporation's misapplying its funds; but we have never been told how it is to proceed. The best thing I can do is to allow this demurrer, not giving leave to amend.

(a) *King v. Watson and others*, 2 Term Rep. 200.

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PRICE v. WILLIAMS AND OTHERS.

LINCOLN'S INN HALL.—1806: 20th Jan.

A receiver cannot be appointed without mortgagee's being before the court, if a mortgagee appears upon the face of pleadings.

THIS was a bill by an infant against the trustees and executors of her father; praying an account of real and personal estates, the appointment of a guardian, receiver and maintenance.

I moved for a receiver upon the answers of the trustees and executors, showing a misapplication of the personal estates, in incurring an expense of 500*l.* for a funeral feast in Wales, the personal estate not being sufficient to pay debts: and 2dly, a violation of the \*rule, that a trustee to sell shall [\*32] not buy, which the defendant Jones had done, he alone managing the real property. The real estate was not charged with payment of debts; but the testator had directed the rents and profits to be applied in paying what he owed to one Gore, who in the answers was stated to be a mortgagee for 16,000*l.*

Mr. *Owen* opposed the motion, upon the ground that the mortgagee not being before the court, the order could not be made, and stated that his Honor, in a late case, had so decided.

I replied, that the bill prayed no relief against him, and that it would be sufficient to undertake to give him notice of the appointment; but his Honor refused the motion.

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 1806.—Barker v. Harper.
 

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## BARKER v. HARPER.

1806: 16th June.

Purchaser under a decree of the court is not entitled upon an affidavit that he has had his money lying ready for some time, to be let into possession of estate, and receipt of rents for all such time so passed.

MR. JOHNSON moved to pay the purchase-money of an estate into court, and to be let into the possession and receipt of the rents from Christmas day last, upon an affidavit that he had been ready to complete his purchase, and had his money ready ever since, lying dead in a banker's hands.

Mr. Hart and Mr. Cooper, *contra*.—You should have moved to pay the money into court, when it would have been laid out. This, if done by special application, would not have been an acceptance of the title.

[\*33] \*The CHANCELLOR was of the same opinion, and ordered the party to be only let into the receipt of the rents from Lady day last past.

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 LANGSTON AND OTHERS, INFANTS v. OLLIVANT AND OTHERS.

ROLLS.—1807: 21st April.

Power to lend trust money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond.

THIS was a bill against the defendants, as trustees, to make them personally responsible for the loss of 500*l.* lent by them upon bond to R. Langston, the plaintiffs' father, who had become since bankrupt. The case was, that John Ollivant, deceased, by his will left a legacy of 1,000*l.* to his daughter Betty, and 500*l.* to the defendants, in trust, to place out the same upon real or per-

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Langston and others v. Ollivant and others.

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sonal security as should be thought good and sufficient, to the use of his daughter for life, and afterwards to and amongst her children; and he declared that his said trustees should not be answerable for any loss which might happen, without their wilful neglect or default. Upon the marriage of Betty Ollivant with John Langston, the defendants, the executors, lent him the 500*l.* in question, upon his bond, and they also, at the same time, lent him 600*l.* of their own money, upon the same security. Evidence was given that John Langston, at the time of his marriage, and of the said loans, was a trader in good credit and circumstances, and that it was not till some years afterwards that he failed.

Mr. *Leach* and Mr. *Cooper* for the plaintiffs:—Defendants must be liable for a breach of trust: 1st. They lent the money to a man in trade, of course made this trust property liable to all the contingencies of trade: 2d. They lent it to a person who evidently was *not a man of property* by his requiring another loan \*of 600*l.* The court has before charged executors [\*34] with a loss by not calling in a bond debt. Where a testator has himself chosen that security, it is harder upon executors to make them answerable for a loss in that case, than where they *take upon themselves* to lend money upon such security, cited 2 Bro. 156, 5 Ves. 839.

Mr. *Wetherell* for defendants:—The executors had the power of lending upon *personal* security given them by the will, and a clause of indemnity in case of loss. There can be no stronger proof of their believing the security good, than that of lending their own money upon it.

His Honor thought that the authority given them did not extend to an *accommodation*, which was what had here taken place. It was evident that the defendants had, upon the marriage, been induced from relationship to *accommodate* the bankrupt with this loan, which his Honor thought they had no power to do, and therefore he was of opinion that they must be responsible for the loss.

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 1807.—Hitchins v. Lander.
 

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## HITCHINS v. LANDER.

1807: 28th July.

Plea of the Stat. 32 H. VIII, c. 9, s. 3, against buying and selling pretended titles: and also that there was *not any mortgage* as mentioned in the bill; to a bill that the defendant might redeem a mortgage, upon a covenant in a lease from the defendant to the plaintiff: held good, though a negative plea.

THE defendant having a claim to an estate, then depending in Chancery, under a limitation in a will, granted a lease thereof to the plaintiff. The defendant afterwards wished to get rid of the conveyance. The plaintiff thereupon filed a bill against [\*35] the defendant, stating himself to be tenant to the defendant of the premises in question under the lease, and alleging that the defendant had given notice to the tenants not to pay their rent to the plaintiff. The bill prayed a discovery of the lease and notice, and that the defendant might be compelled to proceed to a redemption of a mortgage on the premises made to James Halse, or to procure to the plaintiff an assignment thereof; and to come to an account with the plaintiff with respect to the rents and profits of the premises, and to deliver up the possession.

The defendant *Lander* first demurred generally, for want of equity; which demurrer, upon argument, was overruled.

A second demurrer by him, because the said James Halse, the alleged mortgagee, was not a party to the suit, was also, upon argument, overruled.

The same defendant, thirdly, put in a plea to part of the said bill, and which was as follows:

Plea.—“As to so much of the said bill as prays a discovery of any lease, made or supposed to be made between the said defendant and the said plaintiff, of any part of the lands, tenements and hereditaments, of or to which the said defendant was,

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1807.—Hitchins v. Lander.

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or pretended to be so seised or entitled, as mentioned in the bill, and of any notice in writing given, or supposed to be given, by the said defendant to the tenants then in possession of the said premises, or of any part thereof, or any of them; the defendant doth plead and for pleasaith and doth aver, that by the statute made and passed in the thirty-second year of the reign of his late Majesty King Henry VIII, chap. 9, \*sect. 2, against brachery [\*36] and buying of titles, it is enacted, that no person or persons of what estate, degree, or condition soever, he or they shall be, shall from thenceforth bargain, buy, or sell, or by any ways or means obtain, get, or have any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person or persons, in or to any manors, lands, tenements, or hereditaments, except such person or persons who shall so bargain, sell, give, grant, covenant, or promise the same, their antecessors or they, by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole year next before the said bargain, covenant, grant, or promise made; upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, do forfeit the whole value of the lands, tenements or hereditaments, so bargained, sold, promised, covenanted, or granted contrary to the form of the act, and the buyer and taker thereof, knowing the same, to forfeit also the value of the said lands, tenements, or hereditaments, so by him bought or taken; and the half of the said forfeitures to be to the king, and the other half to the party that will sue for the same in any of the king's courts of record, by action, of debt, bill, plaint, or information, in which action, bill, plaint, or information, no essoign, protection, wager of law, nor injunction shall be allowed. And the defendant doth aver, that he had not, according to the best of his knowledge and belief, his antecessors, or they by whom he or they claimed the said lands, tenements and hereditaments, or any of them had not, been in the possession of the same, or any part thereof or the reversion or remainder thereof, by the space of one \*whole year next before the lease [\*37] and grant charged and inquired after by the said bill;

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 1807.—Hitchins v. Lander.
 

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neither was the plaintiff then in lawful possession by taking of the yearly farm rents or profits, of or for the said lands, tenements and hereditaments, or any part thereof. And the said defendant doth plead the said statute, and that the making such discovery may tend to subject the said defendant, not only to the forfeiture of the value of the said lands, tenements and hereditaments, by the said bill charged to have been so granted and demised as therein mentioned; but also to make the said defendant liable to the pains and penalties incurred by unlawful maintenance at the common law; and the said defendant humbly prays the judgment of this court whether he ought to be compelled to make any further or other answer to such part of the said bill as he hath before pleaded to. And to such part of the said bill as seeks any decree against the said defendant to compel him to proceed to a redemption of the mortgage supposed to have been heretofore made of the said premises by the said defendant to James Halse, in the bill named, or to procure for the said plaintiff an assignment thereof, and to come to an account with the said plaintiff in respect of the rents and profits of the said premises, and to deliver up the possession thereof to him; the said defendant doth plead thereto, and aver that no part of the said premises ever was, or is now, subject to any mortgage thereof, made by the said defendant to the said James Halse."

Sir *Samuel Romilly* and Mr. *Hall*, in support of the plea, cited Co. Lit. 369 a, to show that a lease for years was clearly within the meaning of the statute. *Sharp v. Carter*,<sup>(a)</sup> was a [\*38] case in this court upon the \*same statute, against giving the discovery. *Leigh v. Helyar*,<sup>(b)</sup> a case in the Star Chamber, had also decided, that in such a case the party was liable, after the year and day had expired, to the pains and penalties of maintenance at common law, though he could not be sued under the statute after that time. As to the latter part of the plea, which is, that no part of the said premises ever was, nor is now subject to any mortgage thereof, made by the defendant to the said James Halse, it is good, though a negative plea.

(a) 3 P. Wms. 375.

(b) Moore's Rep. 751.



1809.—*Edwards v. Harvey.*

A negative plea may be good if it reduces the plea to a single point. *Plomer v. May*,<sup>(a)</sup> *Hall v. Noyes*,<sup>(b)</sup> in which last case Lord Thurlow admitted that he was mistaken in before holding that a negative plea was bad. That a plea of "not heir" was good at law appeared by the statute of Westminster the Second,<sup>(c)</sup> which recites, that in a plea of mortdauncestor, the tenant might plead that the plaintiff is not next heir of the same ancestor by whose death he demanded the land, and enacts, that in writs of cosinage, aiel and besaiel, which are of the same nature, that plea shall also be admitted. Pleas in this court are of the same nature as pleas at law.

Mr. *Hart* and Mr. *Bell* argued against a negative plea, as not permitted in this court. In a case<sup>(d)</sup> in equity, where "not heir" was pleaded, it was overruled.

The LORD CHANCELLOR (after consideration) thought the plea was good, and allowed the same; but gave the plaintiff leave to amend his bill.—Reg. Lib. A. 1806, fo. 1290.

(a) 1 Ves. 426.

(b) 3 Bro. C. C. 489.

(c) Stat. 13 Ed. I, c. 20.

(d) *Gunn v. Prior*, 2 Dick Rep. 657.

\*EDWARDS v. HARVEY.

[\*39]

ROLLS.—1809: 6th June.

Handwriting of a relation deceased rejected as evidence of pedigree.

THIS was a bill for a specific performance of an agreement for the sale of an estate.

On the part of the defendant, the purchaser, an objection was taken to the title, that A. B., from whom the plaintiff claimed, was not proved to be related to C. D., who was the granting party in the conveyance to the plaintiff.

An issue being directed, the jury found for the defendant.

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 1810.—*Edwards v. Harvey.*


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A motion being made for a new trial, the question was, whether a paper, offered to be produced as evidence on the part of the plaintiff, and which Mr. Baron Graham had rejected at the trial, ought to have been received as evidence? It was a pedigree drawn out by Bridget Lloyd, a maiden lady, deceased, showing that C. D., who was her relation, was related to A. B. It was made after the doubts arose as to the pedigree; but she herself was dead, and it was found amongst her papers.

Mr. *Serjeant Williams*, Mr. *Abbott* and Mr. *Bell*, for the plaintiff, contended that as she, if alive, might have been examined by releasing, therefore this paper was admissible. If that which has been spoken as hearsay is evidence, why should not that which is written?

Mr. *Richards*, Mr. *Dauncey*, Mr. *Taunton* and Mr. [\*40] *Cooper* for the defendant:—\*Nobody shall make evidence for himself. Mrs. Bridget Lloyd had an interest in establishing a relationship.—Cited 13 Ves. 514; Salk. 288.

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*June 8th.*—His Honor refused the new trial, because, if Mrs. Bridget Lloyd's pedigree, written by herself, were evidence for her relation; so would her declaration have been evidence to show that she was herself entitled to the estate.

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#### SAME CASE.

ROLLS.—1810: 9th February.

Vendor not making a good title, ordered to pay costs, though he was only a trustee to sell.

THIS cause afterwards coming on for farther directions and costs, Mr. *Richards* and Mr. *Cooper* argued that the bill must be dismissed with costs. The general principle is, that if the title

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1810.—*Edwards v. Harvey*

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proves good, the purchaser must pay costs; and if the title proves bad, he must have them. The Master of the Rolls acted upon that principle in *Bishop of Winchester v. Paine*.<sup>(a)</sup> The question as to a purchaser receiving costs, arises two ways: 1st. Where he is plaintiff, and a strong case is then necessary to deny him costs, if the vendor cannot make a title: 2d. Where he is defendant, and being passive in such case, a much stronger still is necessary. In *Vancouver v. Bliss*<sup>(b)</sup> the purchaser's taking possession, under the representation that a title could be made, was insufficient to exclude him from costs.

Here the defendant had offered to take the title if a bond of indemnity was given him. There is no doubt but that at law he would recover his costs.

\*Sir Samuel Romilly and Mr. Bell argued that the title [\*41] being bad, only makes a *prima facie* case for costs. Here the defendant had made numerous objections, and though he had succeeded in one, that was not enough to entitle him to costs for the rest.

Mr. Richards in reply:—As the report was for the defendant, he could not except to the Master's opinion as to the objections he disallowed.

HIS HONOR:—The title in a suit being bad, only makes a *prima facie* case for costs. In many cases circumstances outweigh that. Though the plaintiffs are trustees to sell, the defendant has nothing to do with the character in which they stand; he is ignorant of that when he buys. As to the objections overruled, they might have been very properly made, though an answer was given to them, or they were removed; and the purchaser has no opportunity of canvassing the Master's judgment as to them, where the report is in his favor.

Bill dismissed with costs.

(a) 11 Ves. 194.

(b) 11 Ves. 458.

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1810.—Buxton and Parnham v. Monkhouse.

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## BUXTON AND PARNHAM v. MONKHOUSE.

LINCOLN'S INN HALL.—1810: 27th February.

The Property Tax Act, 46 Geo. III, c. 65, s. 112 and 115, in declaring covenants to pay the same void, has a retrospective operation: therefore covenant entered into before the act passed, void.

Receiver ought not to be appointed where there is a trustee with power of entry and distress.

SIR SAMUEL ROMILLY and I moved that the order appointing a receiver in this cause might be discharged.

[\*42] \*By indenture of the 12th March, 1805, the defendant granted an annuity of 50l. a year to the plaintiff Buxton, secured on leasehold property comprised in his marriage settlement, with power of entry and distress, and a covenant from grantor not to deduct the property tax. The annuity being in arrear, the plaintiffs filed this bill; and got a receiver appointed on an *ex parte* proceeding. By the answer, since put in, it appeared that the defendant had, before the bill filed, tendered the arrears due, deducting the income or property tax of 10l. per cent. which had been refused.

We argued, that an annuity was within the meaning of the act, and particularly comprised in s. 112 and 115 of 46 Geo. III, c. 65, and that by the latter section the covenant, though prior in date to the statute, was made void, the words being "*made or entered, or to be made or entered,*" which were clearly retrospective.

Mr. Agar, *contra*.

THE LORD CHANCELLOR:—I think this receiver improperly appointed: the plaintiff Buxton having a trustee with power of entry and distress on the leasehold estates. Indeed, I have often thought it dangerous ever to appoint a receiver *ex parte*.

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 1811.—Tonkin v. Sir John Lethbridge.
 

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As to the act, I think the defendant has a right to make the deduction in question; but let the motion stand over to furnish me with an affidavit as to what rents have been received or are due.

Receiver discharged.

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\*TONKIN v. SIR JOHN LETHBRIDGE.

[\*43]

Before Lord ELDON. LINCOLN'S INN HALL.—1811: 7th, 10th, and 11th December. Heir at law filing a bill to redeem a mortgage, having also brought in the claim of a third person to the heirship; if he himself is found upon an issue not heir, he cannot by supplemental bill have the benefit of the original suit, as the purchaser of the heirship in such third person. On demurrer to supplemental bill.

THIS was a bill filed by the plaintiff as heir at law *ex parte materna*, of the mortgagor, praying a redemption. The defendant by his answer denied that the plaintiff was such heir at law. The plaintiff thereupon amended his bill by stating, that, "in and previously to the month of January, 1808, James Kekewich having set up a claim to the estate in question, as heir at law of the mortgagor, and thereupon by deeds of lease and release, dated in the said month of January from the said James Kekewich, to plaintiff duly executed by the said James Kekewich, for a good and valuable consideration paid by plaintiff, the said James Kekewich by sufficient words effectually granted, conveyed and assured all the said estates and premises, with the appurtenances thereof, unto and to the use of plaintiff and his heirs;" and no farther answer was put in by the defendant, none being required of him. At the hearing, an issue was directed to try whether the plaintiff was such heir at law, and it was found that he was not.

The plaintiff then filed a supplemental bill, stating that by indenture of release and confirmation, dated the 9th April, 1811, Kekewich had granted, released, ratified and confirmed the said

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 1811.—*Tonkin v. Sir John Lethbridge*.
 

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estate to plaintiff, and praying that he might be declared entitled to the redemption and conveyance prayed by the original bill. To this supplemental bill the defendant demurred to the discovery and relief; because it did not appear by such supplemental bill that any new matter had arisen since filing the [\*44] original bill in the cause, which was \*properly matter of supplement, and because it appeared by the said supplemental bill that the plaintiff claimed to be relieved touching the matters in the said supplemental bill mentioned, by virtue of the purchase of a certain pretended title, and which purchase, if any such was made, was contrary to law.

Sir *A. Piggot*, Mr. *Richards* and Mr. *Hall*, for the bill, cited Lord Redesdale, 59; and *Jones v. Jones*, 3 Atk. 110.

Sir *Samuel Romilly*, Mr. *Hart* and Mr. *Bell* for the demurrer.

THE LORD CHANCELLOR:—To entitle a plaintiff by a supplemental bill to the benefit of former proceedings, it must be in respect of the *same title*, in the *same person*, as stated in the original bill. If, in the present case, the title now relied on was sufficiently stated in the original bill, that is ground for a *re-hearing* of the cause: if it is not, then any third person, as well as the plaintiff, might file a supplemental bill. If two original bills had been filed to redeem, one by the present plaintiff, and the other by Kekewich, and then the issue at law was found in favor of Kekewich, whereupon the plaintiff had bought Kekewich's title, it is clear that the purchase should be stated by supplemental bill in Kekewich's suit, and not in the present plaintiff's. If I do not mention the case on Tuesday, it is to be considered that the demurrer is *allowed*.

His Lordship mentioned it, and gave again pretty much the same reasons for allowing the demurrer; but without prejudice to plaintiff's filing an original bill.

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1812.—*Millar v. Horton.*

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\**MILLAR v. HORTON.*—*DISNEY v. HORTON.* [\*45]*BOLLA*—1812: 4th March.

A direction in a will to pay simple contract creditors before specialty ones, is not void; being within the exception in the Statute of Fraudulent Devises.

BILL by specialty creditors, against executor and trustee to be paid a debt of 8,000*l.*, out of personal estate, as far as it would go, and the residue out of real estate.

The testator, by his will had directed his personal estate to be applied, in the first place, in the payment of debts *out of his family and to strangers*, and his real estate to be sold, and *simple contract creditors to have a preference*, and then to pay specialty creditors.

The second cause was instituted by simple contract creditors, to be paid according to the directions of the will, or if not, then *pari passu*.

Mr. *Hart* and Mr. *Cooper* (the legality of the administration directed of the personal estate being given up), argued that the direction to pay simple contract creditors was void, not being within the exception in the Statute of Fraudulent Devises. *Vernon v. Vaudry*, in Barnard, 304, and which the register's book confirms, held a devise to pay debts, excepting a debt as surety, was not within the proviso of the statute.

Sir *Samuel Romilly* and Mr. *Wilson*.:—This is within the exception, being for payment of debts. Here it is for payment of *all* debts, not excepting any. *Vernon v. Vaudry* contained an exception.

His Honor thought this devise satisfied the words of the proviso, being for payment of *debts*.

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1812.—Stabback v. Leatt.

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[\*46]

\*STABBACK v. LEATT.

1812: 10th June.

Plea (to a bill to redeem a mortgage) of a conveyance by the mortgagor of the equity of redemption, in trust to sell and pay the mortgage, and a bond debt from him and two other persons, and a conveyance from the trustee to the mortgagee, nobody offering at an auction so much as was due for the mortgage money with interest and costs: ordered to stand for an answer with liberty to except.

THE bill stated that in 1760, Samuel Stabback and Mary his wife, executed a mortgage, either in fee, or for some term of years, to Elizabeth Leatt, the sister of the defendant, for securing the sum of 209*l.* with interest. Samuel Stabback died intestate in 1770, leaving the plaintiff his heir at law. In 1790, Elizabeth Leatt, took possession, and shortly after died, leaving the defendant entitled under her will to the said mortgage. Mary Stabback, the plaintiff's mother also died. The bill charged that the defendant and his sister, in her lifetime, always treated the estate as redeemable, and kept the accounts thereof; and that about two years before filing the bill he had acknowledged to the plaintiff, that he had only a mortgage title, and submitted to be paid off. The prayer of the bill was for a redemption.

The defendant put in a plea to the said bill, and thereby stated, that by indenture, dated the 6th July, 1765, after reciting that by deed of the 20th March, 1762, Samuel Stabback mortgaged to Hannah Hall the premises for one thousand years, to secure 150*l.*, it was witnessed, that in consideration of the said 150*l.* paid by William Holwell to Hannah Hall, and of 50*l.* to Samuel Stabback, the said mortgage was assigned to him, William Holwell, to secure 200*l.* with interest. That by indenture of the 4th January, 1769, reciting that by articles before the marriage of Samuel Stabback and Mary his wife, it had been agreed, that of a sum of 300*l.* to which she was entitled as her fortune, the said Samuel Stabback should receive 100*l.* for his own use, and the remaining 200*l.* be settled upon the said Mary, and that the said



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1812.—Stabback v. Leatt.

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Samuel Stabback, upon receipt of the \*said 100*l.* was on [\*47] his part, in return also to settle certain premises upon her; and reciting that the said Samuel Stabback had not received the said 100*l.*, and that he had sold and disposed of the said premises; it was witnessed, that upon payment of 230*l.* to the said William Holwell, so much then being due to him for principal and interest upon his said mortgage, and which 230*l.* was so paid off by and out of the said trust sum of 300*l.*, the said William Holwell thereby assigned, and the said Samuel Stabback confirmed, unto John Holwell and John Stabback, the said premises and the said term, in trust for the said Mary Stabback's separate use for life, remainder as she should appoint by will or deed, in default of appointment for their children and if no child, for her executors, administrators and assigns.

That by indenture of the 26th March, 1773, George Stabback and John Holwell, together with Samuel Stabback and Mary his wife, transferred the said mortgage to Elizabeth Leatt, to secure 200*l.* lent and advanced by her, with interest, and the equity of redemption was thereby reserved to Samuel Stabback and Mary his wife. That by indenture of the 12th August, 1774, reciting the said mortgage, and that John Holwell and Gilbert Langdon had joined Samuel Stabback as security for him in a bond to Elizabeth Leatt for 40*l.*, the said John Holwell and George Stabback, together with Samuel Stabback and Mary his wife, conveyed their interest in the said premises to William Hobbs and Gilbert Langdon upon trust for sale of the said premises, and to apply the money arising therefrom in payment of the said 200*l.* mortgage money, and also the said bond for 40*l.*, and then to pay the residue to Mary Stabback's separate use. That by indenture of the 26th April, 1796, Ann Hobbs, the widow and executrix of \*William Hobbs (which [\*48] William Hobbs had survived the said Gilbert Langdon), after reciting that there was then due to the defendant John Leatt, as representative of the said Elizabeth Leatt, 370*l.* for principal and interest on the said mortgage, being more than the value of the said premises, and that at an auction, which had

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1812.—Jones and others v. Gilham and others.

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been held, no person would bid so much for them; the said defendant, in compliance with the request of the said Elizabeth Leatt, had agreed to assign the premises and the moneys due thereon for principal, interest and costs, to his daughter Eleanor Leatt, and had requested the said Ann Hobbs to join in the same assignment: she, the said Ann Hobbs, therefore, in consideration of 5s., and the said John Leatt in consideration of natural love and affection, assigned and transferred to the said Eleanor Leatt, the said premises, and also the said bond for 40l.

Mr. *Leach* and Mr. *Spranger* argued for the plea.

Sir *Samuel Romilly* and Mr. *Phillimore* against it.

THE LORD CHANCELLOR : (a)—The idea I have of it is, that it is not a good plea. The equity of redemption is conveyed for the purpose of discharging certain demands made upon the mortgagor and certain individuals, that is, the individuals who executed the bond. The trustee to convey could only convey so much interest as she had, namely, the estate in trust to sell.

The plea was ordered to stand for an answer with liberty to except. (b)

(a) The judgment *ex relatione*.

(b) See *Brooks v. Middleton*, *post*.

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[\*49] \*JONES AND OTHERS v. GILHAM AND OTHERS.

The Master of the Rolls for the Lord Chancellor.—1812.

The plaintiff in a bill of interpleader is not entitled, after replying to the answers, to move for his costs, but must set down the cause for hearing.

THIS was a bill of interpleader, filed by the plaintiffs, as directors of the Hope Insurance Company, against the defendant Gilham, as landlord of a house burnt down, and who had brought his action for the amount of the insurance, and against

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1813.—*Headley v. Readhead and others.*

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the defendant Jones, as tenant under an agreement for a lease, who had filed a bill for specific performance against plaintiffs and the other defendant, praying against plaintiffs that they might lay out the money in rebuilding the premises pursuant to the statute.

The plaintiffs obtained an order enjoining both parties from proceeding in the said suits, upon the plaintiffs paying into court the amount of the insurance.

The defendants answered separately, admitting the above facts; but defendant Gilham, by his answer, insisted that this was not a case for interpleading, the defendant Jones having no right to the money.

The plaintiffs having replied to the answers, and served subpoenas to rejoin, now moved to have their costs paid out of the fund in court.

Mr. *Hart* and Mr. *Cooper* for the motion.

Sir *Samuel Romilly*, *contra*.

His Honor took time till the next day to consider, and then at the Rolls delivered his opinion, that the defendants were at liberty, upon motion, to take advantage \*of the [\*50] ground of demurrer stated in the answer; and that the plaintiffs must set down the cause for hearing; and refused to give the costs of the cause to them in the present stage of the suit.—See *post*, S. C.

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#### HEADLEY v. READHEAD AND OTHERS.

ROLLS—1813: 25th May.

Where the vendor of an estate would have absorbed the personal assets in payment of his purchase-money, a ratable contribution was decreed as between the devisee of the estate and the legatees and annuitants under the purchaser's will.

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1813.—Headley v. Readhead and others.

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WILLIAM READHEAD, the testator in this cause, by his will, reciting that he had contracted for the purchase of an estate, directed his executors to pay the purchase-money for the same, and he devised the said estate to his natural son, the defendant, William Readhead, and he also gave several legacies and annuities to the other defendants.

The bill was filed by the executors, to take the directions of the court, there being a deficiency of personal estate to pay both the purchase-money and the legacies and annuities; occasioned by some Scotch leaseholds not having passed by the will, which was not made according to the forms of the Scotch law, but the same descended like real estate to the heir at law.

Upon the hearing of the cause, the usual accounts were directed, and inquiries as to the purchase.

The Master, by his report stated the accounts, and the contract for purchase of the estate, by the result of which it appeared that the personal estate was about sufficient to pay either the purchase-money due, or the legacies and annuities, but *not both*.

[\*51] \*Sir Samuel Romilly, Mr. Hart and Mr. Cooper for the legatees and annuitants:—This is a case in which the vendor, as a creditor for his purchase-money, absorbing the personalty, and thereby defeating the legatees and annuitants, the assets must be marshaled in their favor. That the benefit of a vendor's lien for his purchase-money shall be extended to third persons, see *Trimmer v. Bayne*, 9 Ves. 209. The direction in the will makes no difference, the testator equally intended the legatees and annuitants to be paid as the vendor.

Mr. Leach and Mr. Trower for the devisee:—The general principle of marshaling is admitted; *Trimmer v. Bayne* decides no more; but this is a case of *special provision* by the will. Besides, the report has not been excepted to, by the legatees and

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1813.—*Jervoise v. Silk.*

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annuitants, and therefore the Master's finding of the personal estate liable to pay debts cannot be impeached. Neither can assets be marshaled as between specific and pecuniary legatees, in which case the devisee and the other defendants stand.

Sir *Samuel Romilly* in reply :—The Master can never find a conclusion of law; he can never marshal assets; he can only find the facts. If the defendants are in the situation of legatees, then the devisee, in respect to the sum to be paid for the residue of the estate, is in the same situation as the other defendants, and there must be a ratable contribution.

His Honor took time to consider, and afterwards decided that this was a case for ratable contribution.

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\*JERVOISE *v.* SILK.

[\*52]

ROLLS.—1813: 1st June.

Maintenance, under the circumstances, given to a father, who had £6,000 a year of his own, and although no report of debts had been made.

In this case, which was a petition to confirm a report of maintenance, it appeared that the father who sought for maintenance had 6,000*l.* a year; that the six infants, his children, were entitled to an estate of 8,600*l.* a year, according to the present rental; but which of course would increase.

No report has been made as to debts.

The petitioner, however, stated by affidavit, that the expenses of his establishment, consisting of a house in Hanover Square, a house in Essex, and another in Hampshire, which latter, however, he was proceeding to dispose of, were fully equal to his income. The Master had found that 1,400*l.* a year for the six children, the eldest being thirteen, including a governess for the

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 1813.—*Jervoise v. Silk*.
 

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girls, would, in his opinion, be a proper allowance. By affidavit it was stated that the funds were sufficient for debts, &c.

Mr. *Hart* opposed the confirming the petition upon two grounds: 1st. Of the father being competent, having 6,000*l.* a year; 2d. That the application was premature, the debts not being paid.

Sir *Samuel Romilly*, Mr. *Richards* and Mr. *Cooper* for the petitioners:—The preliminary objection has been got over by Lord Eldon, in *Warter v. ———*, 13 Ves. 92, upon the authority of a case cited of *Wear v. Wilkinson*, before Lord Rosslyn, [\*53] and upon the principle of the length of \*time the taking the accounts might consume. It is enough if the court is satisfied *aliunde* that the property is sufficient; 2d. though *prima facie* 6,000*l.* a year seems to give a father competency to maintain his children, yet his establishment must be looked to, and the expectations of the children taken into consideration.

SIR WILLIAM GRANT:—It is very loose to consider any particular income as enabling a father to maintain his children. To a nobleman 6,000*l.* a year certainly would not be thought enough to exclude him from requiring some maintenance out of his children's fortunes. To a private gentleman it may be otherwise. On the outside, it here would seem enough; at the same time the expenses of his establishment, and his children's expectations, are circumstances to be looked to. It would be a harsh thing for the court to oblige the petitioner to put down his establishment in any part to educate his children, when they have large incomes of their own. In the present case, therefore, I shall confirm the report upon this ground, that I do not see enough to make me dissent from the conclusion the Master has drawn, who, of course, had his attention directed to all the facts and particulars, more than the court can possibly have.

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1813.—*Ex parte Hill*.

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**\*EX PARTE HILL.—IN THE MATTER OF BROOKE, A [54]  
LUNATIC.**

Lord ELDON.—LINCOLN'S INN HALL.—1813: 11th August.

Where a lunatic had been tried for murder and acquitted on account of his lunacy, but ordered by the judge to be detained, the Lord Chancellor declined ordering him to be removed out of jail to a proper receptacle for lunatics, the proper application being to the king in council.

BROOKE having been found a lunatic under a commission, was afterwards committed for murder to Warwick jail, and tried and acquitted on the ground of his lunacy; but the judge ordered him to be detained in that jail as a dangerous lunatic under the late act.

This petition was presented by his committee to have certain sums allowed out of his estate for his support, and the expense of his defence on the trial, and also that he might be removed out of jail to a proper receptacle for lunatics.

The LORD CHANCELLOR said there was a difficulty in the way; and after consideration ordered the sums to be paid, with liberty for the committee to make any application they thought proper respecting his custody to the king in council.

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**SKINNER v. SWEET AND WIFE.**

1813: 14th August.

Arrears of annuity ordered to be paid to widow and executrix, although no report of debts had been made, it being stated, by her answer, that there was no deficiency of assets.

I MOVED, before the Vice-Chancellor, that the defendant, the widow and executrix, and who was an annuitant of 250*l.* per annum, charged on leasehold \*estates by the will of [55]

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1813.—*Skinner v. Sweet and wife.*

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the testator, might be paid the arrears due and to grow due by the receiver which had been appointed. No report of debts had been made; but the defendant, by her *answer*, stated that all debts which had come to her knowledge had been satisfied.

The VICE-CHANCELLOR refused the motion for want of the report as to the debts, stating that any legatee might as well apply on the ground of distress; and that if the plaintiff could distrain, that was another reason against coming to the court.

The same day I moved it *as an appealed motion* before the Lord Chancellor, arguing, that though the court would not order any principal sum to be paid, yet that it would direct interest on incumbrances and arrears of annuities to be paid by receivers; and that the defendant could not hear the cause or get a report, and might therefore be kept for many years out of all means of subsistence.

LORD CHANCELLOR:—I think such motions have been granted here; but not to the extent of directing future arrears to be paid; and after consulting with Mr. Croft, the register, he made the order as to the arrears due, the defendant undertaking to refund, if necessary, and referred it to the Master to make a separate report of debts.

N. B. The order was afterwards stopped by the Chancellor, and I had to speak to it again, but was finally made.

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[\*56] \*PARIS v. GILHAM AND OTHERS.—JONES v. PARIS.

ROLLS.—1813: 8th November.

Interpleader may be in favor of an insurance company against the landlord of premises which have been burnt down, but insured by him and the tenant of the



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 1813.—*Paris v. Gilham and others.*


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premises, under an agreement for a lease, and claiming therefore a right to have the money laid out in rebuilding the premises. *Ante*, p. 49.

THE first cause prayed the specific performance of an agreement for a lease against the defendant Gilham, and as against the other defendants, who were the directors of the Hope Insurance Company, that 700*l.*, the amount of a policy entered into by the defendant Gilham, might be laid out in rebuilding the premises, which had been consumed by fire, pursuant to the 14 Geo. III, c. 78, s. 88.

The second cause was a bill of interpleader by the insurance office against the landlord, who had brought an action on the policy, and against the tenant, who had filed the above bill. By an order in this cause the money had been paid into court, and the injunction granted.

Sir *Samuel Romilly* and Mr. *Wilson* for the defendants in the first cause, argued: 1st. That the tenant of premises burnt down had *no equity* against the landlord. *Brown v. Quiller*,<sup>(a)</sup> the only case in favor of such equity, had been overruled by *Hare v. Grove*<sup>(b)</sup> and *Holzapffel v. Baker*.<sup>(c)</sup> 2d. The clause in the Act 14 Geo. III, is where the tenant insures, not the reversioner. If the tenant may file such bill, where the landlord has insured, any owner of a rent charge may do so though issuing out of a hundred houses.

\*Mr. *Leach* and Mr. *Shuter* relied on the words of the [\*57] act.

Mr. *Hart* and Mr. *Cooper* for the company.

N. B. The counsel for both *Paris* and *Gilham* contended that this was no case for interpleader. The insurance office might have moved by affidavit, or tried the point at law. The first bill had prayed an injunction against *Gilham*, the second did no more.

(a) Ambl. 619.

(b) 3 Anstr. 637.

(c) 18 Ves. 115.



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1814.—*White v. Williams and Wife, Faint and Horsfall*

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Evidence was gone into of the testator's intention to make some additions to the provision for his wife. This was entered into by the plaintiff who was the personal representative of the widow, who was an executrix as aforesaid. She claimed half as next of kin, or one-third as executrix.

The defendants Williams and wife claimed as representatives of Wild, one-fourth as next of kin, or one-third as executor. Faint claimed the whole as surviving executor. Horsfall one-fourth as next of kin.

\*Sir Samuel Romilly and Mr. Collinson for the plaintiff. [\*59]

Mr. Hart and Mr. Cooper for Williams and wife.

Mr. Doudeswell for Horsfall.

Mr. Hart and Mr. Hall for Faint.

The evidence of the plaintiff was rejected, because though parol evidence may be given to rebut an equity, it cannot to raise one.

It was argued: 1st. That though unequal legacies to executors would not exclude them, yet the will being imperfect and they having legacies, the court would presume the testator intended to give the residue from the executors; *Knewell v. Gardiner*(a) and *Bishop of Cloyne v. Young*(b) (though in the last case, the residuary clause was begun, but not finished); that the will was imperfect in this case, the bequest of the leaseholds not being finished, inasmuch as it did not direct the leaseholds, and the possession of them to be given to the nephew. 2d. The executor Faint not proving till all the others had died, who had sustained the burden of administering, ought not to have the whole.

The MASTER OF THE ROLLS, however, thought the executors were entitled, because the will in *Knewell v. Gardiner* had begun

(a) Gilb. Eq. Rep. 184.

(b) 2 Ves. 91.

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1814.—*Utterson v. Utterson and others.*

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a sentence, but here not, but only left a space after finishing a bequest.

[\*60]      \*His Honor took time to consider the point of survivorship till this day, when he said the fund in question was unadministered assets, and he thought it must belong to the surviving executor. No costs out of it.

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UTTERSON *v.* UTTERSON AND OTHERS.

1814: 15th August.

Where a testator interlined his will to except the plaintiff, who was named a legatee under it with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil without doing the same with the interlineation of the will, the court admitted the plaintiff to an equal interest with the other parties taking under the will, considering the inference as certain that the testator so intended.

THE testator by his will devised and bequeathed freehold, leasehold and copyhold premises, and all his personal estate equally amongst his children.

By codicil he declared that his son, the plaintiff, should have only 1s. He interlined also his will, by adding, after naming his children, the words, "except my son John James," the plaintiff. The testator afterwards revoked the codicil by obliterating it, but did not do anything with the interlineation of the will.

The codicil was not executed according to the statute, nor was the will republished.

On a suit in the Ecclesiastical Court, the judge, Sir William Wynne, rejected the interlineation in the will, and gave probate without it.

The freehold and copyhold estates being sold, the plaintiff filed his bill for a share of the purchase-money, equally with his

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1814.—Glossop v. Harrison and Hawkes.

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brothers and sisters, the latter being *femes covert* whose interests had been put in settlement before their marriages; and one of them having issue, \*rendered this suit necessary [\*61] to take the decision of the court upon the case, which all the parties who were *sui juris* would otherwise have arranged out of court.

It was admitted on the hearing that the sentence of the Ecclesiastical Court only affected the personal estate; and that the codicil and interlineation did not revoke the will as to the freeholds, from the want of republication.

His Honor decreed for the plaintiff, considering that the conclusion was a necessary one, that the interlineations were made at the time of the codicil being made.

Sir *Samuel Romilly* and Mr. *Heald* for the plaintiff.

Mr. *Hart*, Mr. *Bell* and Mr. *Cooper* for the defendants.

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GLOSSOP v. HARRISON AND HAWKES.

1814: 21st July; 20th August.

A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in court, in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety, and the same giving him therefore a lien on the money ordered to be paid to the receiver.

THE original bill in this case was filed on the 29th June, 1814, against the defendant Harrison alone, stating that he was appointed under an order of this court receiver or treasurer of the Opera House, and that thereupon the plaintiff became his surety in a bond for 3,000*l.*, conditioned for his duly accounting to the \*trustees of the said theatre for the moneys that [\*62]

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1814.—Glossop v. Harrison and Hawkes.

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should come to his hands as such receiver, and paying the same into their banker's hands. Shortly afterwards Harrison was in advance for the Opera House, in consequence of payments made by him to the tradesmen and others belonging to that theatre. Harrison also had been in some degree compelled by the threats and clamors of the above creditors, and also to enable the theatre to go on, to apply part of the moneys received by him as such treasurer in discharge of their demands, instead of paying over the same into the banker's hands. Upon that occasion he applied to the plaintiff, and borrowed of him the sum of 143*l.* 16*s.*, for which he gave him the following promissory note:—"143*l.* 16*s.* London, Feb. 20, 1813. One month after date I promise to pay to F. Glossop, Esq. the sum of one hundred and forty-three pounds sixteen shillings, for value received, to enable me to pay into the bankers the nightly receipt of Saturday, the 15th February, instant, which I made use of in paying the weekly bills of that night at the King's Theatre, by order of Mr. Taylor, and to complete which Mr. Taylor sent me 12*l.* 9*s.*, and should Mr. Taylor or the trustees re-instate me with the above sum of 143*l.* 16*s.* before this bill is due, I hereby promise to discharge the said bill. H. Harrison." By an order, dated the 29th June, 1813, Harrison, on his own application, was discharged from his office of treasurer, and it was thereby referred to the Master to take an account of the moneys paid by him on account of the theatre. The Master, by his report, dated the 18th March, 1814, allowed him the sum of 451*l.* 6*s.* 1*d.*, and reported the same to be due to him in respect of his advances. On the 26th April, 1814, the court ordered the said sum of 451*l.* 6*s.* 1*d.*, so certified to be due to Harrison, to be paid to him.

[\*63]     \*The bill farther stated that the said sum of 451*l.* 6*s.* 1*d.* included the said sum lent by the plaintiff to Harrison, and for which he had given the above note, but which had never been paid, and it prayed that the plaintiff might be paid the said note out of the 451*l.* 6*s.* 1*d.* reported due to Harrison, and that the latter might be restrained from receiving the same.

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1814.—Glossop v. Harrison and Hawkes.

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Harrison, by his answer and disclaimer, admitted the above facts; but stated, that by indenture of assignment, dated the said 29th June, 1814, he had conveyed all his estate and effects, including the above sum reported due to him, to Thomas Hawkes, in trust for Hawkes and the other creditors of Harrison; and he disclaimed for himself all interest in the said sum.

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*July 21st.*—Hawkes, as such trustee, proceeding to get the money which had been ordered to be paid to Harrison, the plaintiff moved that the accountant-general might be directed not to pay to Harrison the sum of 451*l.* 16*s.* 1*d.* ordered to be paid to him.

*Mr. Leach* and *Mr. Trollope* for the plaintiff.

*Mr. Bell* and *Mr. Cooper* for the defendant.

It was argued by the plaintiff's counsel, that the alleged execution of the deed of assignment being upon the same day as the bill was filed, was probably after, and that the court would not let the fund go out of court till they saw more of the case.

It was insisted by the defendants, that it was contrary to the practice of the court to grant this order, especially as the defendant had disclaimed; and that though \*the bill [\*64] was filed, and deed bore date both on the same day, there was no evidence of the bill being filed before the deed was executed, or ground for inferring it.

The VICE-CHANCELLOR, however, was of opinion that justice required that the order should be made, putting the plaintiff upon the terms of amending his bill immediately, by making Hawkes a party.

The bill being amended by adding Hawkes as a defendant, he put in his answer, and thereby stated that he was a stranger to

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1814.—*Glossop v. Harrison and Hawkes*.

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all the circumstances of the case, except the order for the payment of the 451*l.* 6*s.* 1*d.* to Harrison, and he relied upon the assignment to him of the 29th June, 1814, as executed in the forenoon of that day; and that although the plaintiff's bill was filed on the same day, yet he had no notice of the same until after the execution of the said indenture of assignment, and he submitted that the plaintiff had no lien upon the said sum of 451*l.* 6*s.* 1*d.* for the said debt of 143*l.* 16*s.*

*August 20th.*—The plaintiff moved, before the Lord Chancellor, on this day, for an injunction to restrain the defendants from receiving the 451*l.* 6*s.* 1*d.* insisting upon the plaintiff's lien for the amount of the note, and that the terms of the above note gave him such lien.

The LORD CHANCELLOR thought there was some case which had determined that the surety for a receiver was entitled to stand in the place of the receiver to the extent of his demand, in a case of this sort, and ordered the motion to stand over for the purpose of looking into the books for such a case.

[\*65] \*On the following day the counsel for the plaintiff informed the court that they had not been able to find such a case, but they cited *Wright v. Morley*(a) as an authority for the principle that a surety was entitled to the same right as the creditor.

Sir *Samuel Romilly*, for the defendant *Hawkes*, argued that *Wright v. Morley* did not apply to the present case, that being merely the common case of the right of the surety being made available against the separate property of the wife of the principal, which had been conveyed with her privity to secure an annuity granted by the husband. Here the assignment was to the defendant *Hawkes*. In this case the note was only an engage-

(a) 11 Ves. 12, 22.



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 1814.—*Howgrave v. Cartier.*


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ment to pay out of moneys received by Harrison from the trustees, whereas he had received none from them, but had got an order upon a fund in court.

The LORD CHANCELLOR said that he thought he had a note of a case himself, as between the surety of a receiver and such receiver, deciding the equity which he had before mentioned, and he would look for it.

Some time afterwards, and just before the long vacation, his lordship said(a) he had not been able to find the note of the case which he had before mentioned; but said that if there was no such case, that there ought to be such a decision now made, and he granted an injunction according to the prayer of the motion.

The parties afterwards came to a compromise.

(a) *Ex relations.*

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\*HOWGRAVE v. CARTIER.

[\*66]

ROLLS.—1814: 29th July.

Power of appointment in a marriage settlement held to comprehend, as its objects, all the children of the marriage, and not to be confined to such of the children only as should be living at the death of the survivor of the parents.

THE question in the cause was, whether a power of appointment contained in the marriage settlement after stated, comprehended as its objects all the children of the marriage; or whether it was confined to such children only as should be living at the death of the survivor of the parents?

The settlement was dated the 20th April, 1743, and was made between Peter Wyche and Elizabeth his wife, of the one part, and Lord Tyrconnel and William Mildmay, trustees, of the other part; and after reciting, in substance, that the said Peter Wyche in consideration of his marriage with the said Elizabeth his wife,

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1814.—Howgrave v. Cartier.

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and of considerable property which he became entitled to in right of his said wife, had agreed to invest on or before the 24th day of June, 1740, the sum of 20,000*l.* South Sea annuities, in the names of trustees, for the uses and upon the trusts after declared; and that he had transferred to Lord Tyrconnel and William Mildmay 10,000*l.* South Sea annuities, in part of the 20,000*l.* South Sea annuities; and had agreed to secure a transfer of the remaining 10,000*l.* by a charge upon lands belonging to him, sufficient for that purpose; the settlement contained a demise by the said Peter Wyche to the trustees of certain lands therein described, for a term of one thousand years, for securing the transfer of such remaining 10,000*l.* South Sea annuities.

The deed then, after containing some ordinary and common covenants and clauses for the better and more effectually securing the transfer of the remaining 10,000*l.* South Sea annuities, and declaring that the trusts of the whole 20,000*l.* were [\*67] in the first place out of the \*dividends or interest, to pay to Elizabeth Wyche an annuity of 200*l.* for her separate use, and after payment of that annuity to pay the residue of the dividends or interest to the said Peter Wyche for life, proceeded as follows:

“ Provided nevertheless, that if the said Elizabeth, the wife of the said Peter Wyche, shall die before him, the said Peter, *without leaving* any child or children of her body begotten by the said Peter Wyche, or if *leaving* any such child or children they shall all die, before any of them shall attain the age of twenty-one years, then upon trust to pay or cause to be paid such sum or sums of money not exceeding together in the whole 8,000*l.*, to such person or persons, or to and for such uses, intents and purposes, and at such time or times as the said Elizabeth, the wife of the said Peter Wyche, shall, notwithstanding her coverture, by any writing or writings by her signed and sealed, in the presence of two or more credible witnesses, direct or appoint. And in case of such direction or appointment, that they the said John, Lord Viscount Tyrconnel and William Mildmay, or the

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1814.—Howgrave v. Cartier.

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survivor of them, or the executors, administrators, or assigns of such survivor, do and shall, with all convenient speed, and notwithstanding the said Peter Wyche being then alive, sell so much of the said capital stock or fund of South Sea annuities as will be sufficient to answer and make good such direction and appointment of the said Elizabeth Wyche, the wife of the said Peter Wyche, and in case the said Elizabeth shall survive the said Peter Wyche, then upon trust to pay the whole of the dividends or interest arising from the said South Sea annuities unto the said Elizabeth, or her assigns, during the term of her natural life, to be in full bar and recompense of her dower

\*and thirds at the common law, that she might or could [\*68] claim out of any manor, messuages, land or hereditaments whatsoever, that the said Peter Wyche should happen to be seised of, interested in or entitled unto, at any time during the coverture between them. And from and after the decease of the survivor of them, the said Peter Wyche and Elizabeth his wife, in case there shall happen to be any child or children of their two bodies living who shall be of the age of twenty-one years, or who shall after arrive to such age, born in the lifetime of the said Peter Wyche, or after his decease, then upon trust that they the said John, Lord Viscount Tyrconnel and William Mildmay, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall transfer the whole of the said sum of 20,000*l.* South Sea annuities so transferred, and secured to be transferred to them as aforesaid, unto or amongst *such* child or children of the said Peter Wyche and Elizabeth his wife, at their respective ages of twenty-one years, in such proportions and manner as the said Elizabeth Wyche, sole or married, shall, by any deed or writing, under her hand and seal, either executed by her alone, or in conjunction with the said Peter Wyche, in the presence of two or more witnesses, direct or appoint; and for want of such direction or appointment, then upon trust to transfer the same unto *such of the said child or children*, at their age or ages of twenty-one years, and in such proportions and manner as the said Peter Wyche shall, by any deed or writing, under his hand and seal, executed by him ir

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the presence of two or more witnesses, or by his last will and testament in writing, executed and attested as aforesaid, direct and appoint; and for want of such direction or appointment,

both of the said Elizabeth Wyche and the said Peter [\*69] \*Wyche, then upon trust to transfer the whole of the said sum of 20,000*l.* South Sea annuities unto *such* child or children of the said Peter Wyche and Elizabeth his wife, at their respective age or ages of twenty-one years, if more than one, share and share alike; and if there should be but one *such* child, then to such one child only; and in case there shall be no such child or children, or they shall die before any of them shall attain the age of twenty-one years, then upon trust to transfer the said sum of 20,000*l.* South Sea annuities unto the survivor of them, the said Peter Wyche and Elizabeth his wife, for his or her own use, or as such survivor shall direct or appoint; saving nevertheless, in case the said Peter Wyche should be such survivor, the power aforesaid given to the said Elizabeth Wyche, to charge the said sum of 20,000*l.* South Sea annuities, with the payment of any sum or sums of money not exceeding the sum of 3,000*l.* as aforesaid."

After this clause followed a proviso, empowering the trustees, at the request of the said Peter and Elizabeth Wyche, or the survivor of them, to sell the South Sea annuities, and to invest the money to arise from such sale in government security, or stock in any of the public funds, and from time to time to change such securities, or to sell the same, and invest the money thereby arising in the purchase of lands, which lands, when purchased, the settlement expressed, should be settled as near as might be to such uses as were thereinbefore mentioned concerning the South Sea annuities, with the following exception:

"Except that in case there shall be no appointment made by the said Elizabeth Wyche, or the said Peter Wyche, of [\*70] the said lands *to the children they may \*happen to have*, that the said lands so to be purchased shall not be equally divided amongst *such children*; but shall be limited to the use

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1814.—Howgrave v. Cartier.

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and behoof of the first and all and every other son and sons of the said Peter Wyche, begotten or to be begotten on the body of the said Elizabeth his wife successively, and in remainder, one after another as they shall be in seniority of age and priority of birth, and to the use and behoof of the heirs of the respective body and bodies of every such son and sons; and for want of such issue, then to the use and behoof of all and every the daughter and daughters of the said Peter Wyche, on the body of the said Elizabeth begotten or to be begotten, if more than one, to take as tenants in common, and not as joint tenants, and to the heirs of the body of every such daughter or daughters; and for want of such issue, then to the right heirs of the survivor of them the said Peter Wyche and Elizabeth his wife for ever."

The settlement then, after containing some further common covenants and clauses, which it is unnecessary to state, concluded with a covenant on the part of Peter Wyche, that his heirs, executors and administrators should and would within six months after his death pay to the said Elizabeth Wyche, in case she should survive him, 5,000*l.*, for her own use, over and above the several matters aforesaid.

There were issue of the marriage two children, John and Mary.

Peter Wyche died in the year 1763. After Peter's death, Elizabeth Wyche, on the 28th April, 1769, appointed 5,000*l.*, part of the 20,000*l.* South Sea annuities, to the son John absolutely, for his immediate use: and \*such 5,000*l.* was [\*71] transferred to him accordingly. On the 9th June, 1769, she made a further appointment of 11,650*l.* other part of the 20,000*l.* South Sea annuities, to be transferred to John absolutely, after her death. John afterwards died in the lifetime of his mother, having by his will, dated the 8th June, 1769 (the day before the last appointment), left all his property to his mother, and appointed her sole executrix: and she as executrix procured from the trustees a transfer to her of the 11,650*l.* The mother

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 1814.—*Howgrave v. Cartier*.
 

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then died in March, 1784, without having made any valid appointment of the remaining 3,350*l.*, leaving Mary Wyche, the daughter, surviving her. Mary died in March, 1810, without ever having had any part of the 3,350*l.* transferred to her. At the time of her mother's death she was in a weak state of mind, and she continued so down to the period of her own death.

The bill was filed in 1812, by the administrators of Mary Wyche, against the executors of the mother Elizabeth Wyche, who, as above stated, was the sole executrix of the son John Wyche, and against some persons in whose names the unappointed 3,350*l.* was standing, insisting that the power of appointment in the settlement, was confined in its objects to such children of the marriage as should actually be living at the death of the survivor of Peter and Elizabeth Wyche, and that a child dying before that period could neither take under an appointment, or for want of appointment, and consequently that the appointments of the 5,000*l.*, and 11,650*l.* in favor of John Wyche, were void, and that those two sums, as well as the remaining 3,350*l.*, being unappointed, all vested in Mary Wyche, as the only child who was living at the death of the survivor of Peter and Elizabeth; and praying a declaration accordingly, [\*72] and that the 3,350*l.* might be transferred to \*the plaintiff, as the administrator of Mary Wyche, and that the executors of the mother, who were also the representatives of John the son, might out of the estates of the mother and son, reinvest the 11,650*l.* and 5,000*l.*, and that the same when reinvested, might be transferred to the plaintiff, as the administrator of Mary.

The cause was argued by Mr. *Hart*, Mr. *Lovat* and Mr. *Preston* for the plaintiff; and by Sir *Samuel Romilly*, Mr. *Leach*, Mr. *Bell* and Mr. *Newland* for the defendants.

In the course of the argument, the following cases were cited: *Wingrave v. Palgrave*, 1 P. W. 401; *Woodcock v. The Duke of Dorset*, 3 Bro. 569; *Hope v. Lord Clifden*, 6 Ves. 499; *Wilmot*

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*v. Wilmot*, 8 Ves. 10; *Schenck v. Leigh*, 9 Ves. 300; *Powis v. Burdett*, 9 Ves. 428; *King v. Hake*, 9 Ves. 438; *Randall v. Metcalf*, 3 Bro. Parl. Cas. 8vo. 318; *Jeffreys v. Reynous*, 6 Bro. Parl. Cas. 398; *Doe v. Wainright*, 5 T. R. 427.

Nothing turned upon the circumstance of John Wyche's will being made the very day before the appointment of the 11,650*l*.

THE MASTER OF THE ROLLS:—Many late decisions have established the principle upon which cases of this nature are to be decided. If a settlement clearly expresses that the right of a child to a provision shall depend upon its surviving its parents, the court cannot alter or control such a disposition. But if the language of a settlement be contradictory or ambiguous, the court exercises its own principle, and will lean in favor of such a construction \*as shall give the children vested [\*73] interests; a son at twenty-one, a daughter at twenty-one or marriage. *Wingrave v. Palgrave*,<sup>(a)</sup> is a case of the first description. Other cases, which have been cited in argument, are of the last description.

As to *Wingrave v. Palgrave*, it is impossible that a doubt could exist. For there was no daughter living at Augusten Palgrave's death: and consequently the trust of the term never rose.

As to the other cases: In *Woodcock v. The Duke of Dorset*,<sup>(b)</sup> the settlement, according to the report of that case, contained very strong expressions: and Lord *Thurlow* had great difficulty to get the better of them. But collecting from the whole of the settlement taken together, an intention inconsistent with those expressions if taken by themselves and construed according to their strict and literal sense, he broke through them, and gave effect to what he conceived to be the true spirit and meaning of the deed. It has been stated from the bar that the printed

(a) 1 P. Wms. 401.

(b) 3 Bro. 569.

1814.—Howgrave v. Cartier.

report of that case is inaccurate, and that the expressions in the settlement, as it is set forth in the register's book, are by no means so strong as the report represents, and might without difficulty be construed so as to let in all the children, instead of confining the word "such" to such children only as should survive both parents. But I think there was great difficulty in the case, even taking the expressions of the settlement according to the register's book. (a) \*In the case of *Hope v. Clifden* (b) also, there was a good deal of difficulty: but notwithstanding, the court construed \*the settlement so as to vest the portion. In *Powis v. Burdett*, (c) Lord Eldon by management and struggle changed the word "leave," into "have." In *Schenck v. Leigh*, (d) I took advantage of the slip, wanting the word "such."

(a) The witnessing part of the settlement extracted from the Reg. Lib. B. 1789, fol. 121, was in the following words: "It was witnessed that for the considerations aforesaid, and of 500*l.*, part of the 5,500*l.*, being the portion of the said Lady Frances Sackville, which it was thereby agreed that the said John, Lord Gower, should retain to his own use, and also of 10*s.* paid, &c., the said John, Lord Gower, did bargain, sell and demise unto John, Duke of Bedford and Granville Levison Gower the manor of Greenndon, in the county of Stafford, with the several messuages, farms and appurtenances thereto belonging, of the yearly value of 700*l.*, to hold to the said John, Duke of Bedford and Granville Levison Gower, their executors, administrators and assigns, for five thousand years, at the rent of a pepper-corn, upon trust, that the said duke and Granville Levison Gower should, out of the rents and profits of the said premises, or by sale or mortgage thereof, or of a competent part thereof, for all or any part of the said term, raise and pay the yearly sum of 200*l.* to the said John Lord Sackville and Lady Frances his wife, during their natural lives, and the life of the longest liver of them, by two equal half-yearly payments; and upon further trust, that if the said John, Lord Sackville and Lady Frances his wife, should leave at the decease of the survivor of them any child or children of their two bodies lawfully begotten, or to be begotten, then to raise and levy the yearly sum of 200*l.*, by two equal half-yearly payments as aforesaid, and apply the same for the maintenance of such child or children, in such manner as the said trustees should think fit, until such child or children should attain the age of twenty-one years, then by ways and means aforesaid, to levy and raise the sum of 5,000*l.* and PAY the same unto THE children, if more than one, OF THE BODIES of the said John, Lord Sackville and Lady Frances his wife, lawfully begotten or to be begotten, in equal shares and proportions, upon THEIR attaining their respective ages of twenty-one years; and if there should be but one such child, then upon trust to pay the whole sum of 5,000*l.* to such only child at his or her age of twenty-one years."

(b) 6 Ves. 499.

(c) 9 Ves. 428.

(d) 9 Ves. 300.



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1814.—Howgrave v. Cartier.

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Now in the present case, if the construction the plaintiffs contend for were to be adopted, the parents never could make any provision for or any appointment in favor of any child excepting such as should survive them both: and yet how could such a child be ascertained in their lifetime: how could they know any child would survive them? Though a child might attain twenty-one, and be married, yet according to the plaintiff's construction, if such child happened to die in the lifetime of either of the parents, any provision or appointment in favor of it would fail. Surely this could not have been the intention of the parents. They never could have meant to put it out of their power to make any appointment.

The effect of the clause which gives the power of appointment, and limits the fund in default of appointment, depends upon the correct use of the word "such." Throughout the settlement, that word is repeatedly used, inaccurately and absurdly, and without any meaning. And I cannot collect a clear and \*unambiguous intention that the parties, by the use of the word "such" in this passage, meant to exclude all children excepting such as should survive both parents. [\*76]

I am, therefore, of opinion that the appointments to the son of the 5,000*l.* and 11,560*l.* were good. And as the persons to take in default of appointment are the same description of persons in favor of whom an appointment might be made, I am also of opinion that one-half of so much of the 20,000*l.* as is unappointed, vested in the son, and the other half vested in Mary Wyche, his sister.



REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF CHANCERY,  
IN  
HILARY TERM, 1815,

IN THE FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

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\*AGAR v. THE REGENT'S CANAL COMPANY. [\*77]

First seal before Hilary Term.—LINCOLN'S INN HALL.—1815: 14th January.  
Though the court will not restrain an action of trespass by a party through whose estate a canal is cutting for deviating from the line, because he has laid by and rested upon his legal rights; yet if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so, without a trial by jury in a disputed case, and directing an issue at law.

THE bill in this case was filed by the plaintiff, as the owner of an estate through which the defendants proposed to make the canal, which they were empowered to cut by a private act of Parliament obtained by them for the purpose. The prayer of the bill sought an injunction to restrain the defendants from carrying the proposed canal through the plaintiff's garden and rickyard.

An application was made upon filing of the bill, supported by an affidavit of the facts stated in the bill, for an injunction according to the prayer above mentioned, and which the Lord Chancellor granted.

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1815.—*Agar v. The Regent's Canal Company.*


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Upon the coming in of the answer, the defendants [\*78] moved to dissolve the above injunction, and the \*court, upon hearing counsel on both sides, varied the injunction so far as to restrain the defendants only from deviating in cutting their canal from the line prescribed by the eleventh section of the act of Parliament,<sup>(a)</sup> and the plan left in pursuance thereof in the office of the clerk of the peace for the county of Middlesex.

The parties not coming to any understanding between themselves as to what was the line prescribed by the act of Parliament and contained in the plan, the defendants' agents and workmen were proceeding in making the cut according to the judgment which they had formed as to such line. The plaintiff thereupon moved the court to commit them to the Fleet prison for a breach of the injunction which he had obtained. Various affidavits by engineers, surveyors and others were filed on both sides, by which it appeared that the deviation made by the defendants from the line, if anything, was not very considerable; and those made on the part of the defendants imputed to the plaintiff an endeavor to throw every obstacle in their way in making the canal, and a refusal on his part to point out any line whatsoever passing through his estate as the one prescribed by the act of Parliament.

The application was argued at considerable length during the preceding term by Sir *Samuel Romilly* and Mr. *Bell* in support of the motion for a committal; and by Mr. *Hart*, Mr. *Leach* and Mr. *Wetherell* against it. Pending the application some proposition for an accommodation was made by the plaintiff to the defendants, but which appeared not to have been agreed to. The motion stood for judgment till the above day.

[\*79] \*The LORD CHANCELLOR, after stating the circumstances of the case, and the proceedings which had taken place in the cause, said that it was quite clear that the defendants had a

(a) Passed 13th July, 1812.

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 1815.—Cholmondeley v. Clinton.
 

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right to carry their canal through some part of the plaintiff's estate, but must adhere to the line prescribed by the act of Parliament, and the plan deposited in the office of the clerk of the peace. That if companies of this sort receive the encouragement of the legislature, as they do, they must not be stopped altogether by any individual; on the other hand, they are bound to see that the execution of the act of Parliament, is in the first place according to their powers under it; and in the next place that it is in a practicable manner. If in the present case the plaintiff, instead of filing his bill in equity, had lain by and rested upon his legal rights, and then brought an action of trespass against the defendants for a supposed deviation from the line pointed out by the act of Parliament, this court would not on a bill filed by the defendants have restrained the plaintiff from proceeding in such his action of trespass. But if the plaintiff, instead of bringing his action of trespass, because the other side, as he supposes, has gone wrong, chooses himself to come into equity, and affidavits are made by engineers and surveyors on their behalf, that the line pursued by them is the correct line; though this evidence is met by affidavits on the other side, this court will not, without further examination, take so strong a step as to commit the defendants, but will first direct an issue at law to try the fact, and endeavor to find out thereby the true line which the canal ought to take. His lordship also stated, that any proposal of accommodation he considered merely as *ad referendum*, and which in no case could influence his judicial opinion.

The motion was refused.

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\*EARL CHOLMONDELEY AND ANN SEYMOUR DAMER v. [\*80]  
LORD CLINTON AND OTHERS.

LINCOLN'S INN HALL.—1815: 16th and 17th January.

A solicitor for one of the parties in a suit cannot become the solicitor for the opposite party, though he is separated from the partnership which jointly were so em-

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1815.—*Cholmondeley v. Clinton.*

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played on the other side, and the remaining partner still continues so employed, and the deed of dissolution stipulated that he should not act as solicitor for that party. On motion for an injunction to restrain such solicitor who had gone over from so acting.

SIR SAMUEL ROMILLY, supported by Mr. *Bell*, Mr. *Heald* and Mr. *Preston*,<sup>\*</sup> moved in this cause, on the behalf of the defendant Lord Clinton, for an injunction "to restrain Lord Cholmondeley from employing William Montriou, a solicitor of this honorable court, and also one of the attorneys of his Majesty's Court of King's Bench, as his solicitor in this suit, or as his attorney or solicitor in any other suit in equity or action at law, commenced or to be commenced by the said Earl Cholmondeley against the said Lord Clinton, in respect to any estates or property, the title whereof came to the knowledge of the said William Montriou, as the clerk to William Seymour, one of the above named defendants, a solicitor of this honorable court, while the said William Seymour was the attorney and solicitor of the defendant Lord Clinton, or which came to the knowledge of the said William Montriou, as solicitor for the said Lord Clinton, in partnership with the said William Seymour and one William Squibb, and also to restrain the said William Montriou from acting as solicitor or attorney for the said Earl Cholmondeley in any such suits or actions, and from communicating to the plaintiff Earl Cholmondeley, his counsel, solicitors, attorneys or agents, any information relating to the matters in dispute, in such suits or actions which have come to the knowledge of the said William Montriou as clerk to the said William Seymour, or as solicitor to the said Lord Clinton."

[\*81]     \*It appeared by the affidavit of Lord Clinton, that he had been informed by Lord Cholmondeley himself that he had received information from an anonymous person relative to Lord Clinton's estates, in consequence of which Lord Cholmondeley had commenced the suit against him in question. That the said William Montriou had been formerly a clerk to William Seymour, who was his lordship's solicitor, and afterwards becoming his partner, they were both employed by his

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1815.—Cholmondeley v. Clinton.

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lordship as his solicitors to conduct his defence in this suit; and that he believed that the said William Montriou, first as clerk to, and afterwards as partner with the said William Seymour, acquired such information relative to the title of the defendant to the estates in question in this suit, and matters connected therewith, as would render his being concerned in the management of this suit as solicitor for the plaintiff Earl Cholmondeley highly prejudicial and injurious to the deponent.

The affidavit of William Seymour then stated, that in 1805 he was first employed by Lord Clinton as his attorney and solicitor; that about the same time the said William Montriou became his clerk at a salary; that he continued such clerk till Christmas, 1808; that in 1809 articles of partnership were entered into between them; that as such partners they were the solicitors of Lord Clinton, which partnership was dissolved at Michaelmas, 1813; and that a little before such dissolution Squibb became a partner. The said William Montriou, whilst he was such clerk and partner with Seymour, became intimately acquainted with the title to Lord Clinton's estates, by preparing or correcting abstracts of such title, his peculiar employment being the conveying department; that in 1812 the claim was made by the plaintiffs to the estates in question, which are of the estimated value of several hundred thousand pounds, and [\*82] a bill was accordingly filed in June, 1812. The affidavit then stated, that shortly after the separation, William Montriou, on the 19th December, 1814, wrote a letter to inform Seymour of his appointment to be solicitor for the plaintiff Lord Cholmondeley, in the conducting of his suit against Lord Clinton; and that Seymour immediately wrote the following note to him: "Mr. Seymour has read Mr. Montriou's note with the greatest astonishment, and should he persevere in consenting to conduct for Lord Cholmondeley the suits originally confided to him and Mr. S. by Lord Clinton, S. must consider Mr. M. as acting unjustly to Lord Clinton, and dishonorably to Mr. S. It is impossible but that Lord Clinton would impute to Mr. Montriou the

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1815.—Cholmondeley v. Clinton.

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having betrayed his confidence by communicating to Lord Cholmondeley the doubt upon which he has founded his claim."

Against the motion the affidavit of William Montriou stated, that Seymour alone communicated and corresponded with Lord Clinton, and advised with his counsel, and that the result was kept a secret from the deponent and all other persons in the office; but he admitted that he was well acquainted with the abstract of the title of Lord Clinton to the estates in question in the cause, but that all the deeds contained in it were stated in the pleadings; that by a stipulation in the deed of dissolution of partnership, Montriou could not be employed as solicitor for Lord Clinton; that after the dissolution of partnership he wholly lost sight of the suit, and on the 13th of December last he received a note from Timothy Brent, Esq., the secretary and confidential agent of the plaintiff Earl Cholmondeley, intimating his the said

Timothy Brent's intention to call upon the deponent on the [\*88] following \*day between three and four o'clock; that the said Timothy Brent did in consequence call upon deponent, and then communicated Earl Cholmondeley's wish for the deponent to take the future conduct and management of this cause, for and on behalf of him the said earl and Ann Seymour Damer, the other plaintiff in this cause; that the said Timothy Brent having explained to the deponent the cause and particular motives which had induced the said earl to apply to the deponent, he, deponent, begged permission to defer giving any answer until the following day; that deponent on the following day, namely, on the 15th December last, wrote and sent to the said Timothy Brent a letter in the words following: "Sir, since I had the honor of receiving Lord Cholmondeley's message relative to the Clinton suits, I have availed myself of the counsel of a gentleman eminent in the profession. The hesitation which I previously felt to oppose the interest of Mr. Seymour, my late partner's client, in a matter of such extreme importance, has been removed, and I now beg to express my readiness to obey his lordship's commands. I am, "Sir, yours obediently, WILL.



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1815.—Chomondeley v. Clinton

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MONTRIOU." That the deponent afterwards, by the desire and at the request of the said Earl Cholmondeley, waited upon and saw the said earl, and agreed to accept his appointment; that the deponent neither directly nor indirectly solicited or sought for such appointment; on the contrary, the same was most unlooked for and unexpected on the part of deponent. The deponent then denied that he was in possession of any information acquired by him as clerk, or as partner to Seymour, relative to the estates in question, which rendered his being employed for the plaintiffs highly prejudicial and injurious to the defendant. He also offered to make an affidavit denying that he was the person who had made the communication to Lord Cholmondeley.

\*The affidavit of Brent stated, that having heard Wil- [\*84] liam Montriou, of Basinghall street, in the city of London, gentleman, spoken of in a very flattering manner, and as a solicitor well qualified to manage and conduct causes in Chancery, deponent recommended and advised the said earl to appoint the said William Montriou to be the solicitor for the plaintiffs in this cause, and upon and in consequence of such recommendation, the said earl directed deponent to apply to the said William Montriou, and deponent did accordingly apply and request the said William Montriou to accept such appointment; and deponent says, he does not believe that the said William Montriou either directly or indirectly solicited or sought for such appointment; on the contrary, deponent believes that the application made by deponent to the said William Montriou as aforesaid, was quite, on the part of the said William Montriou, unexpected and unlooked for.

The counsel in support of the motion, admitted that this application was novel, or at least that no precedent for it could be found; but they argued that it was right upon the general principle that an attorney or solicitor was bound not to disclose facts coming to his knowledge in such character, and which was the privilege of the client or party, and not of the solicitor himself,

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 1815.—Cholmondeley v. Clinton.
 

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and they cited for this the cases of *Wilson v. Rastell*,<sup>(a)</sup> and a case there cited by Mr. Justice Buller, in which the doctrine of privilege was fully discussed before Lord Hardwicke, also *Buller's Nisi Prius*, 284, and *Sandford v. Rennington*.<sup>(b)</sup> This privilege of the client never ceases. Lord Clinton, in the present case, had not turned off Montriau; if he had, the case [\*85] might perhaps be different. But one \*partner leaving another does not amount to that. As there has been a joint undertaking by them, it constitutes a joint obligation of secrecy. It would even be easy for a solicitor by his conduct to compel his client to discharge him, if the being discharged would enable him to go to the other side. But Montriau's dissolving partnership with Seymour, though it was discharging Lord Clinton, could not discharge himself from the duties and privileges which had resulted to the client from the confidence that had been reposed in him. It is also contrary to the oath of solicitors, by which they swear faithfully to serve their clients.

Sir Arthur Pigott, Mr. Hart, Mr. Leach, Mr. Roupell and Mr. Shadwell, opposed the motion, as not only unprecedented, but as attended with most extensive consequences. If a solicitor can be so restrained, every clerk may be so also, and the principle would even extend to counsel, conveyancers, &c. There is no decision, or even *dictum*, to show any such general rule. In this case, there was a stipulation in the deed of dissolution of partnership, that Montriau should never be employed by Lord Clinton, and to which Lord Clinton assented by continuing to employ Seymour, and not Montriau. As to the sacred obligation of secrecy supposed to exist, it cannot be after the employment ceases, a person exercising a profession being a sort of public servant; so a counsel advises on pleadings, not being retained, and is the next day retained on the opposite side, and may then advise for such opposite party. If an attorney violates his oath, he may be proceeded against criminally, but this court has no preventive power against his so doing.

(a) 4 Term. Rep. 753.

(b) 2 Ves. jun. 189.

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1815.—*Cholmondeley v. Clinton*.

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\**Sir Samuel Romilly*, in reply :—Of the two questions [\*86] in this case, first as to the legality of the conduct in question, and secondly as to the delicacy of it; not one of the counsel have said a word in support of the latter. That a solicitor can never discharge a client, which is the principle of the remaining question, the cases of counsel do not show the contrary. It is not pretended that a retained counsel can give his services to the opposite party; now a solicitor is a retained adviser, and the analogy therefore is against *Montriou*, if it has anything to do with the case. This is not a case merely of criminal conduct cognizable elsewhere, which it is sought as such to prevent, but also to stop irreparable injury which may otherwise be done to the defendant. Burning a house is a crime; but it is also waste, which may nevertheless be restrained in equity. I consider this application, even as something more than a motion made in this cause only, for it is also an appeal to the general jurisdiction of the court over solicitors. As to the denial of possessing information which may prove highly prejudicial and injurious to Lord Clinton, it is a denial in the words of Lord Clinton's affidavit, but an answer in the terms is not an answer to all the alternatives of the paragraph.

The LORD CHANCELLOR, in the course of the argument, observed more than once, that this application must be determined upon a general principle and ground, and not upon the particular circumstances of the case, because, otherwise, that breach of confidence must take place, and that discovery be given, which the application in its nature protests against.

His Lordship, after the argument, expressed his opinion to be, that the case lay within a very narrow compass, though \*it had led to a great length of discussion. In the present [\*87] case the plaintiff had been informed by somebody of a supposed flaw in the defendant's title; *Montriou* had been a clerk to, and afterwards partner with the defendant's solicitor in the cause, and now was appointed the plaintiff's solicitor in this very cause. If, said his lordship, I were sitting on the trial of

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1815.—Cholmondeley v. Clinton.

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a cause at *nisi prius*, I should have great difficulty in deciding that a clerk becoming afterwards a partner could give evidence against a client of matters which had come to his knowledge whilst such clerk. The dissolution of partnership which took place in this case between Seymour and Montriou was a contract entirely between themselves, with a clause also that Montriou should not act as Lord Clinton's solicitor. As to the argument that Lord Clinton by assenting to that, must be taken to discharge Montriou, I cannot agree to it. The client must employ one or the other, or neither; it is impossible he can employ both; if Montriou was discharged, Seymour might also have been discharged; if one is employed, as he alone can be, is the other then let loose, as it is termed? If neither is employed, are both let loose? there being in this case a covenant between these solicitors themselves, that one of them shall not accept such employment from the defendant. It cannot be. I am, therefore, clearly of opinion that there is no ground in this case for saying that Montriou was a discharged solicitor. I also lay out of my view of this case the facts relative to the application to Montriou to become the plaintiff's solicitor. I consider the question to be, nakedly, whether a person having been long officiating in a cause as the solicitor, and afterwards discharging himself, as I must take it that Montriou did in this case, by the dissolution of partnership, can afterwards become the attorney on the other side in that cause. Now, I may have overlooked circumstances in my life, but I certainly do not \*recollect [\*88] an instance of it to have ever before happened. In the absence of precedent or law appearing upon the subject, the reasonableness of the thing must be looked to. But even if an attorney is discharged, can it be, that his having been so discharged by one party shall be the very reason why the other party shall employ him? In this case I repeat, that I form my judgment upon the dry ground of right, not upon the circumstances or delicacy of the case. If Lord Cholmondeley asks my judgment upon the delicacy of the case, as he seems to do from a letter in one of the affidavits, I must act as Lord Thurlow once did in my hearing to a noble lord now dead, who sat on the

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1815.—Cholmondeley v. Clinton.

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bench whilst his cause was hearing, in which cause that noble lord had admitted interest upon a debt claimed, and the case being argued first upon the legal right to interest, and next as to the delicacy in withdrawing any admitted right; Lord Thurlow desired the arguments as to the delicacy to be addressed to the noble lord, and those only as to the law to be addressed to himself. So, in the present case, I must also take leave to act in the same manner. I leave the delicacy of Lord Cholmondeley's conduct to his own decision. But this being a general point, applicable as much to all the courts of justice as to this, I will myself speak to the common law judges upon the subject, and then communicate their opinion.

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*January 25th.*—His lordship this day stated, that he had requested the Chief Justice of the Courts of King's Bench and Common Pleas, and the Chief Baron of the Exchequer, to inform him of the opinions of their respective courts upon the above point; that he had been informed by Lord Ellenborough and Lord Chief Justice Gibbs that the opinions of their two courts were, that an attorney could \*not be allowed so to act: [\*89] that he had also spoken to the Master of the Rolls and the Vice-Chancellor, and that they concurred in the opinion; but he had not yet been able to learn the opinion of the Court of Exchequer, which, however, he would communicate as soon as he received it.

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*February 3d.*—This morning the Lord Chancellor informed the counsel in this cause, that since the subject was last mentioned, he had received from the Lord Chief Baron of the Court of Exchequer the opinion of that court, which was, that no solicitor who had been employed as such on one side could afterwards be employed on the other. His lordship stated, that the opinion of all the courts and judges he had communicated with also was, that Montriou did not stand in the situation of a discharged solicitor. He added, that he should say no more in judgment upon the

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1815.—Whitfield v. Ralfe.

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motion, as Montrieu had been advised by counsel that he might become the solicitor of the plaintiffs in the cause, and had acted upon that advice, believing it to be right.

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WHITFIELD v. RALFE.

LINCOLN'S INN HALL.—1815: 19th January.

Injunction in this court, though the court of law in which the action has been brought, have, upon an application made to it to stay proceedings, on a release of one of the plaintiffs, and affidavits of the circumstances of the case, refused to stay proceedings.

MR. HART showed cause upon the merits against dissolving the injunction which had been obtained in this case. The circumstances of it were, that the plaintiff applied to the co-executor of Ralfe, for a loan of 700*l.* and which he agreed to lend the plaintiff out of their testator's assets, upon the plaintiff executing two separate bonds of 400*l.* and 300*l.* to Ralfe and his co-executor jointly. The 400*l.* was paid to the plaintiff, but the 300*l.* was not, though the defendant's co-executor had a promissory note for 300*l.* due to the testator in his hands. Payment of the 300*l.* notwithstanding the bond had been given for it, was delayed for four years, at the end of which time the defendant's co-executor becoming insolvent, Ralfe was for the first time apprized of the non-payment of the 300*l.* and requested to give up the bond. This was not complied with, and an action commenced against him upon it. Whitfield, having got a release of the action from the co-executor of Ralfe, applied to the court in which the action was brought to stay the proceedings, which the court, upon hearing the circumstances, refused to do.

Mr. *Leach*, on the other side, contended that courts of common law exercised an equitable jurisdiction in deciding upon applications such as had been made in this case; and that the plain-

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1815.—Freebody v. Perry.

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tiff having once failed in such appeal to equity, was not entitled to an injunction in this court. Besides, from the circumstances of the plaintiff suffering so long a time as four years to elapse, after giving the bond, before he informed Ralfe of his having never received the 300*l.* from his co-executor, showed that they had agreed to pocket so much of the testator's property between them, and that the bond was merely to indemnify the defendant's co-executor in so doing.

THE LORD CHANCELLOR:—I confess I have some difficulty in admitting the exercise of the equitable jurisdiction of courts of law as here stated. I take the question in this [\*91] cause to be, whether the plaintiff by his conduct has not led the defendant into a state of liability to make good this 300*l.*? His co-executor having alone possessed the note for 300*l.*, Ralfe would not have been answerable for it in account, but may become so by taking the plaintiff's bond to himself and his co-executor jointly for that sum.

His lordship continued the injunction; but ordered the 300*l.* with the interest and cost at law, to be brought into court, or, in default thereof, that the injunction should stand dissolved.

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FREEBODY v. PERRY.

1815: 21st January.

Motion by one tenant in common who had agreed to sell to the other, that the latter should pay his purchase-money into court, refused; where such purchaser had been before and at the time of the purchase in possession of the whole, with the approbation of the other tenant in common.

THIS was an appealed motion from the decision of the Vice-Chancellor, who had refused the application.

Mr. *Wakefield*, on the part of the plaintiff, moved for an order that the defendant might pay his purchase money into court. The plaintiff and defendant being tenants in common of the

## CASES IN CHANCERY.

1815—Whitfield v. Relfe.

lands and premises in question, an agreement was entered into between them for the sale of the plaintiff's moiety to the defendant for 2,050*l*. An abstract had been delivered of the title, and no objections taken. The defendant had ever since the date and signing of the agreement, as he had for a considerable time previous thereto, been in the possession of the said [\*92] moiety, and received the rents and \*profits thereof; but by his answer he stated, that he had all along kept an account as between himself and the plaintiff of the rents and profits so received, and had at all times been, and then was, ready and willing to account with the plaintiff for such rents and profits.

Sir *Samuel Romilly* and Mr. *Huddleston* opposed the motion, because it was only where a purchaser took possession without consent, that it constituted a sufficient ground to call upon him to pay his purchase-money into court. That was not the case here, the defendant having long before the agreement been in the receipt of the whole of the rents, with the approbation of the plaintiff, as it was necessary that one party should be where there were tenants in common, and he had always been ready to account with the plaintiff for his share. *Walters v. Upton*(a) was a case where a tenant purchased of his landlord, and when he was called upon for his purchase-money claimed to [\*93] be only tenant, and when called upon \*for his rent then claimed to be purchaser; the court, under those circumstances, ordered him to pay his purchase-money into court.

(a) The reporter has been favored with the brief in *Walters v. Upton*. By it, that case appears to have been as follows: In March, 1812, Sir Samuel Romilly moved in the above cause for the plaintiff, that the defendant might pay his purchase-money into court. The defendant, being tenant, had contracted with his landlord to purchase the premises for 500*l*. The defendant had approved of the title, and had caused a conveyance to be prepared. He afterwards, however, refused to complete his contract, and by his answer made objections to the title.

Mr. Wakefield, for the defendant, insisted that by the agreement, as stated in the answer, the purchase-money was not to be paid till a good title could be made, and relied upon the objections stated in the answer.

The court ordered him to pay his purchase-money into court in six weeks.



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1815.—Corson v. Stirling.

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Mr. *Wakefield*, in reply, insisted that *Walters v. Upton*, was an authority for the present application, which case had turned upon objections to the title; the defendant by his answer in that case had stated, that by the agreement he was not to pay his purchase-money till a title was made, and conveyance executed to him. He was, notwithstanding his possession commenced as tenant, ordered to pay his purchase-money into court.

The LORD CHANCELLOR thought there was no foundation for the application, and refused the motion.

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CORSON v. STIRLING.

1815: 19th and 21st January.

Exceptions to the Master's report, as to impertinence, is not cause against dissolving an injunction.

THE bill in this case was filed by the plaintiff as acceptor of a bill of exchange, against the defendant as holder, alleging that the acceptance was given for accommodation, that the holder was aware of that circumstance, and that he, the holder, never gave any consideration for the bill; and prayed an injunction.

The plaintiff obtained an injunction for want of an answer; the defendant then put in his answer; and the plaintiff referred the answer for impertinence. The Master reported that the answer was not impertinent. The defendant then moved to dissolve the injunction *\*nisi*. The plaintiff then ex- [\*94] cepted to the Master's report; and it now came on upon the day for showing cause against the injunction being dissolved absolutely.

Mr. *Shadwell*, for the plaintiff, insisted, that by the practice of the court, the taking exceptions to the Master's report was

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 1815.—Hooper v. Goodwin.
 

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good cause against dissolving the injunction, until the exceptions were disallowed by the court.

Mr. *Leach* and Mr. *Lovat*, on the part of the defendant, submitted to the court that though exceptions to an answer be good cause against an injunction being dissolved, yet, when the Master has reported against the exceptions, the plaintiff cannot, by excepting to that report, show the exceptions to the report as cause against the injunction being dissolved; for though the original exceptions still continue in court, and the court is to decide upon them, yet *qua* the injunction the Master's report is decisive: and that impertinence stood upon the same footing.

The LORD CHANCELLOR expressed his opinion to be, that the practice was as stated by the defendant, and put it upon the plaintiff's counsel to produce an authority to the contrary; if he did not, the injunction was to stand dissolved.

The next day but one after, Mr. *Leach* informed the court that Mr. *Shadwell* had communicated to him that he was unable to find such an authority.

Injunction dissolved.

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 [\*95]

\*HOOPER v. GOODWIN.

1815: 21st. January.

A residuary legatee has not such an interest as to prevent his becoming himself a purchaser of premises sold under a decree in the cause.

MR. TRESLOVE moved to discharge an order allowing Thomas Kington to open the biddings as to a lot sold under a decree in this cause, upon the ground that he had an interest in the said premises. Kington, it appeared, was entitled under the will of the testator in this cause, as residuary legatee of one-eighth.

It was argued, that if a party interested could open biddings,

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 1815.—Ex parte Kensington.
 

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he had only; if the biddings at the sale were brisk, to be silent; but apply afterwards to the court, which was contrary to the principle of the case of *Sumner v. Charlton*,<sup>(a)</sup> and which case was not clearly and unequivocally impeached in *Rigby v. McNamara*.

Sir *Samuel Romilly* opposed the motion, because if a residuary legatee could not open biddings, it followed that no legatee or creditor could do so. This was not like the case cited, which was that of a party being present at the sale, and afterwards coming to open the biddings.

THE LORD CHANCELLOR:—I am quite sure that there have been cases in which tenants for life and remainder-men of estates, charged with payment of debts, have over and over again been permitted by the court to purchase such estates. But I have often expressed my regret that notwithstanding it is against the rule of the court that the solicitor in the cause should become \*the purchaser, yet in fact he often contrives to [\*96] do so.

Motion refused with costs.

(a) Cited in *Rigby v. McNamara*, 6 Ves. 117.

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#### EX PARTE KENSINGTON.

1815: 23d January.

When the Court of Chancery directs an action to be tried at law, though it is with special directions, as that the bankruptcy of the defendant shall not be pleaded in bar, and that the parties shall be examined on oath, the application for a new trial must be to the court of law; but it is otherwise with an issue.

AN action at law having been directed in the bankruptcy of Stein, Smith & Co., for the purpose of trying a question of usury, charged against the petitioners, who were bankers, and as such had had the transaction in question with the bankrupts; that

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 1815.—*Ex parte Brenchley.*


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action was accordingly tried, when the jury found a verdict in favor of the petitioners.

The *Attorney-General*(a) this day, being the first day of term, came into court, for the purpose of moving for a new trial in the said action, suggesting that the Court of King's Bench, in which the action had been tried, upon his having opened the application for the new trial to that court, had intimated a doubt whether the motion should not be made before the Lord Chancellor, he having directed the action, and made it part of the order that the bankruptcy of Stein, Smith & Co. should not be set up in bar of the action, and that the parties should be examined upon the trial.

THE LORD CHANCELLOR :—The constant and uniform [\*97] practice of this court has \*been, whenever an action has been directed by it, even with all the benefit of such discovery, by the oath of the party, as this court can obtain, I mean by directing the parties themselves to be examined on such trial, that the application for a new trial should be made to the court of law which has tried the action, till that court is satisfied with the verdict; though it is otherwise with an issue, in which case the motion for a new trial is to be made in the Court of Chancery.

The *Attorney-General* having thereupon retired, made his motion for the new trial, on the same day to the Court of King's Bench, which, upon its being stated to them what had passed in this court, entertained the application.

(a) Sir William Garrow.

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#### EX PARTE BRENCHLEY.

1815: 25th January.

Petition to stay certificate not being served till the day of petitions; though not answered till the day before the bankrupt declared entitled to his certificate.

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1814.—*Ex parte Branchley*.

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On the 24th day of September, 1814, a commission of bankrupt was issued against the petitioner, under which he was declared a bankrupt. The petitioner had passed his examination and obtained his certificate. The certificate was on the 29th November, left by the petitioner at the office of the Lord Chancellor, and the advertisement thereof was inserted in the Gazette of the said 29th November. No petition to stay the certificate was served on the petitioner before the next day of petitions, which was on the 21st December.

Mr. *Montague*, in support of the petition, cited *Ex parte Kendall* (a)

\*Mr. *Oullen*, on the other hand, contended that the petition had been served in due time; the same not having been answered till the 20th, and served the day after. The bankrupt had also received it without making any objection. He was also sufficiently apprised of its contents in time to oppose it. But if the bankrupt had not been served in due time, his conduct amounted to a waiver of the objection. [\*98]

THE LORD CHANCELLOR:—Petitions to stay certificates are often presented on private or on interested grounds, as to shut out evidence. I, therefore, thought it proper to lay down a rule upon the subject, that if the bankrupt was not served in time to hear the petition, on the next day of petitions he should be entitled to his certificate. The certificate in this case was brought into the office, and advertised so long ago as the 29th November. The creditors ought, therefore, to have been sooner prepared with their petition to stay the certificate. I think this case falls within the rule. Let the petition to stay the certificate be, therefore, dismissed, and the certificate be granted.

(a) 1 Ves. and Beames, 543.

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1815.—The King v. Knox.

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## THE KING v. KNOX.

Order to set down demurrer in the Petty Bag for argument, made upon motion in court.

MR. ABBOTT moved in this case, being a proceeding in the Petty Bag, to set down a demurrer for argument. It was the case of an escheat upon an attainder for felony; and the defendant having pleaded an outstanding term of years in bar of the right of the crown, the crown had demurred to that [\*99] \*plea. The court was also requested to appoint a day for the argument.

THE LORD CHANCELLOR:—Let the demurrer be put in the paper, and I will communicate hereafter what day I will have it argued.

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EX PARTE HODGKINSON.

Where partners are the petitioning creditors, signature of the bond by one is sufficient. A joint creditor taking a security from one partner on account, but which is not paid, does not render the debt a separate debt.

THIS was a petition to supersede a joint commission of bankrupt taken out against the petitioner and John Leigh. The petitioning creditors were three partners of the name of Crane, Platt and Crump, and upon the taking out such commission a bond for the usual purpose had been given, purporting to be their joint and several bond; but the said bond had been executed by Crump only.

It further appeared that the petitioner had drawn bills in his own name in the payment of the petitioning creditors' debt, before the commission was taken out; but which bills were not

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 1815.—*Ex parte Hodgkinson.*


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paid by the acceptors when they became due. The petitioner had been twice before a bankrupt; under the second of which commissions, though he had obtained his certificate, he had not paid 15s. in the pound. There were now also both a separate and a joint commission taken out.

Sir *Samuel Romilly* and Mr. *Montague*, in support of the petition, relied: 1st. Upon the words of the statute,<sup>(a)</sup> as requiring that all the petitioning creditors should join in the bond, which they argued extended \*to partners, and referred to *Buckland v. Newsame*:<sup>(b)</sup> 2d. That the petitioning creditors, by taking the petitioners' separate bills, had elected to consider their debt as a separate, and not as a joint debt.

The present commission is also supersedable, because the bankrupt not having paid 15s. in the pound, under the second commission, his surplus property belongs to his assignees.

Mr. *Johnston*, for the petitioning creditors, relied upon the constant practice, where the petitioning creditors are partners, for one of them only to sign the bond, though it purports to be the joint and several bond of all the partners, and that it is so stated in Mr. Cooke's book on the Bankrupt Law: 2d. That the bills in question were only taken upon account, and being afterwards dishonored did not discharge the other partner.

THE LORD CHANCELLOR:—Where there is a joint debt it has been the constant practice, for above a century, that the bond should be signed by one of the partners only, and I cannot now say that it is bad. So, as to other matters in bankruptcy, it is a settled practice for one partner alone to prove, one partner to vote in the choice of assignees, and one partner to sign the certificate. Under these circumstances I am bound to be governed by what my predecessors have done, to be of opinion now that

(a) 5 Geo. II, c. 30.

(b) 1 Taunton's Rep. 477.

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1815.—*Ex parte Hodgkinson.*

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this signing is sufficient. If I made a different decision it would cut down all the commissions taken out by partners. This point is, however, now before the Court of King's Bench [\*101] for their \*decision; but I should hope that court would have somebody from this court to state to them the practice which has obtained in this respect here. With respect to dormant partners this court has constantly said, that if a man deals with A. B. knowing nothing of C. D. his partner, and having nothing to do with him, he may consider himself as the separate creditor of A. B.; it has, however, been lately decided at law, that if an action is brought in such a case he may plead the partnership in abatement. I never, however, will disturb the practice here. In the present case, however, the question is whether there being an acknowledged joint debt at one time, it is gone by taking a separate security, but which has never been paid? I think that in this case the bills were taken as a mode of satisfying the debt, and not in discharge of it, and they not having been paid when due, the so taking them goes for nothing. As to the fact of this petitioner being twice a bankrupt before, and not having paid 15s. in the pound under the second commission, I take the law upon that to be, that his future effects are certainly liable; but not to his assignees. It has been decided, that where a creditor brings an action, and the defendant pleads his bankruptcy in bar of the action, the plaintiff may show in reply the fact of 15s. in the pound not having been paid under such second commission, and thereupon future effects are liable in judgment at the suit of such creditor. A similar decision has also taken place in the case of the insolvent acts. But surplus effects are not liable to be claimed by such bankrupt's assignees, and the present commission is therefore clearly not to be superseded upon that ground.

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*February 7th.*—Another petition having been presented in this bankruptcy to supersede the commission, and relying [\*102] still \*upon the above defect in the bond, the Lord



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 1815.—*Spottiswoode v. Stockdale*.
 

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Chancellor this day decided the point upon which he had intimated the above opinion, and stated that he thought the clause in the act did not apply to the case of one of several partners signing the bond. Indeed he considered the point as having been judicially decided over and over again, and acted upon for great many years, in which he must at this day acquiesce, whatever might have been the construction of the act if the point had been *res integra*.

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In *Ex parte Roberts*, which came on 14th March, the same point occurred upon the execution of the bond by only one of the parties who were petitioning creditors, the petition being to supersede the commission upon that ground, the bankrupt being about to be tried at York the following day for concealing his effects. But Lord Eldon, without hearing the other side, said that in *Ex Parte Hodgkinson* he had looked into all the statutes and authorities which bore upon the point, and had collected together all the acts which one partner could do to bind the firm, and the whole formed an irresistible mass compelling him to decide against the objection, and he accordingly dismissed the petition.

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#### SPOTTISWOODE *v.* STOCKDALE.

1815: 19th and 31st January.

Deed of composition by creditors not signed within the time stated in it, though void at law, yet if the creditors act under it, who have not signed it, it is good in equity. Plea of two creditors not having so signed it therefore held bad.

THE bill in this case was filed by some of the creditors of John Stockdale, deceased, who were trustees as hereinafter mentioned, against his widow, who was also his executrix, stating that Stockdale in his lifetime being indebted, called a meeting of his creditors, when it was agreed that he should assign  
 \*to the plaintiffs all his estate and effects as trustees, for [\*103]

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 1815.—*Spottiswoode v. Stockdale.*


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the benefit of themselves and his other creditors. By indenture, dated the 18th May, 1814, he accordingly conveyed a leasehold estate and other effects to the plaintiffs in the usual manner; but with a proviso that in case all the creditors of Stockdale, whose debts respectively amounted to 50% or upwards, except only such creditors who had charges upon the said leasehold estate of the said John Stockdale for their debts, and who chose only to rely thereon, should not by themselves, or by their respective partner or partners, attorneys or agents, thereunto legally authorized, duly execute the said indenture, or a duplicate thereof, or otherwise accede or agree to the terms and conditions thereof, on or before the 18th April next ensuing, then and in such case the said assignment was to be null and void. The bill further stated that Stockdale, shortly after the execution of the said indenture, delivered to the plaintiffs a paper which he assured them contained an accurate list of the names of all the persons to whom he was indebted in the sum of 50% or upwards; and that all the persons included in such list did, on or before the 18th April, 1814, agree to sign the said indenture of the 18th March, 1814, and have actually signed the same. Stockdale died the 21st June, 1814, having first duly made his will, and thereby appointed the defendant his sole executrix, who has since proved the will and possessed herself of his effects. After the death of Stockdale the plaintiffs discovered that he was indebted to other persons to a large amount, besides those included in the list; but to which creditors the bill stated that the plaintiffs have since caused applications to be made requesting them to become parties to the said indenture, and in consequence of such [\*104] applications they executed the same \*accordingly. The plaintiffs charged that although all the creditors of Stockdale did not execute the assignment by the time limited therein for that purpose, nevertheless, as all the creditors executed or otherwise assented thereto, whose names were included in the list delivered to the plaintiffs, they insisted that the indenture was good and valid.

The bill prayed an account against the widow and executrix

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1815.—*Spottiswoode v. Stockdale.*

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of Stockdale, and that his estate and effects might be applied according to the provisions in the deed, and that a person might be appointed to conduct and manage the business, and a receiver appointed of the debts, and that the defendant might be restrained from interfering in the testator's affairs.

To this bill the defendant put in a plea, thereby stating that two persons mentioned in the plea were creditors of Stockdale, and whose debts amounted respectively to 50% or upwards; that they respectively had not any charges on the leasehold estate of Stockdale for their debts; and that they respectively did not by themselves, or by their respective partner or partners, attorneys or agents thereunto lawfully authorized, duly execute the said indenture or duplicate thereof, or otherwise accede or agree to the terms and conditions thereof, on or before the 17th day of April next ensuing the day of the date of the said indenture.

A motion being made at the last seal before the term, upon an affidavit of the facts of the bill, for an injunction to restrain the defendant from interfering in the affairs of her late husband, by receiving any debts, or in any other manner, and to appoint a proper person to manage the business, and also for a receiver; it was objected to such application, that \*pending [\*105] the plea which had been put in, such motion could not be made. And though it was argued in reply to the objection that an *ad interim* order could be made notwithstanding a dilatory; yet the Lord Chancellor ordered the motion to stand over, and the plea and the motion to come on together in the term. The plea and motion afterwards came on together.

Mr. *Hart*, in support of the motion, and against the plea, argued, that the defendant should have put in a demurrer, and not a plea, the question being, whether, under the circumstances stated in the bill, the deed of assignment was not good in equity, though some creditors had not executed it within the time specified in the deed. That this plea was put in as a receipt in full to the application made to the court by the motion.

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1815.—In the Matter of Lord Portsmouth.

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Sir *Samuel Romilly* and Mr. *Shadwell*, for the defendant, argued that a demurrer could not have been put in, because the bill stated, that although all the creditors did not execute the deed of assignment within the time limited therein for that purpose, yet as all the creditors executed, or otherwise assented thereto within that time; whose names were included in the list, that the deed was good and valid.

THE LORD CHANCELLOR:—I take it to be quite clear that if creditors are to execute a deed of assignment by a time stated therein, and it is provided by the deed that in case they do not do so, that the deed shall be null and void; in case they do not execute the deed within that time, the deed is void at law. This deed, therefore, was void at law for that reason. But it is the constant course in equity, that if creditors act under such a [\*106] deed, and thereby treat it as valid, although they have not executed it, that a court of equity will also act under it, and treat it as valid, whether such creditors have signed it or not. The bill in this case stating expressly that such creditors as were not included in the list having been requested to become parties to the deed, they have, in consequence of such applications, executed the same accordingly; the plea does not extend to that fact, and I think it therefore bad: it relies on the non-execution merely, not at all touching the true question in the cause.

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*February 9th.*—His lordship a few days afterwards said, he thought the plea must stand for an answer, with liberty to except.

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#### IN THE MATTER OF LORD PORTSMOUTH

1815.

Private hearings always on the consent of both parties.

THE LORD CHANCELLOR, before going into his private room for the purpose of proceeding with the further hearing of the

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1815.—*Mills v. Fry.*

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petition and affidavits, according to appointment, privately, as he had done before in the same business, desired that it might be understood that it had been the uniform practice in Chancery, as long as the court had existed, that in the case of family disputes, on the application of the counsel on both sides, in such family disputes, to hear the same in the Chancellor's private room; and that what was so done was therefore not the act of the judge, but of the parties themselves in such family cases

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\**MILL'S v. FRY.*

[\*107]

1815: 4th February.

After order to elect to proceed at law or in equity, a receiver appointed by this court cannot distrain for rent, without undertaking to proceed in equity only.

MR. HASLEWOOD moved, on the part of the receiver in this cause, that the said receiver might be at liberty to distrain upon the several tenants of the premises mentioned in the pleadings of this cause who refused to pay their rents to him, and that the above-named defendant might, within a fortnight, deliver to him, the said receiver, an account of all sums received by him for rent of the said premises, and up to what particular time such rents have been received. The application was made upon an affidavit that the tenants had refused to pay the rents, and that he had applied in vain to them and to the defendant for information as to what was due. The bill filed in this case had prayed an injunction to restrain the defendant from receiving the rents, the appointment of a receiver, and that the title deeds might be brought into court. The court had already granted the injunction and appointed a receiver.

Sir *Samuel Romilly*, for the defendant, stated that an order had been obtained on the part of the defendant to put the plaintiff to his election to proceed either at law or in equity, he having brought an action as well as having filed the present bill. On

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 1815.—*Sherwood v. Sanderson.*


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the other hand, the plaintiff had moved to have it referred to the Master whether the proceedings at law and in equity were both for the same thing. This motion had been opposed, and the court having taken time to consider, had not yet disposed of the motion. But he submitted that the order to elect having been made, and the plaintiff not having yet elected whether he would proceed at law or in equity, the court could not now grant the motion made in the cause.

[\*108] \*THE LORD CHANCELLOR:—I doubt whether I ought to have granted the motion for the receiver in this case, or the application for the injunction; but I must have done so upon the principle, that part of the relief, if not all the relief, which the plaintiff claimed to be entitled to, was in equity only, and could not be had at law, namely, the injunction, and the delivery of the deeds. The order for putting the plaintiff to his election having been obtained, and the plaintiff, notwithstanding it, proceeding in equity, I doubt now whether he ought to have the benefit of the order to elect. The receiver might have come as an indifferent person, and applied to the court for restraining the plaintiff from proceeding at law. I cannot help the receiver upon the present application, for if I make this order, every tenant of the estate may to-morrow file a bill of interpleader, in consequence of the proceedings by the plaintiff, both at law and in equity.

The plaintiff, however, undertaking to proceed in equity only, the court made an order, reciting such undertaking, according to the terms of the motion.

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SHERWOOD v. SANDERSON.

1815: 4th February.

No costs upon liberty given to traverse an inquisition in lunacy.

A COMMISSION in the nature of a writ *de lunatico inquirendo* had issued, to inquire of the lunacy of Kitty Sherwood, a plaintiff

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 1815.—*Sherwood v. Sanderson.*


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in this cause. The commission had been executed on the 12th of August, \*1814, and by the inquisition there- [\*109] upon taken, it was amongst other things found that the said Kitty Sherwood was neither a lunatic nor idiot, but of unsound mind, so that she was not sufficient for the government of herself, her manors, messuages, goods and chattels, and that the said Kitty Sherwood had been in the same state of mind since the 1st January, 1814.

Some of the relations of the said plaintiff, Kitty Sherwood, having presented a petition for liberty to traverse the said inquisition, the same had been allowed.

The parties who had presented the first petition for the commission of lunacy now applied by petition to have their costs of suing out the commission taxed and paid to them.

Sir *Samuel Romilly*, Mr. *Martin* and Mr. *Johnson* for the petition, argued that although Lord Loughborough, in *Ex parte Ferne*, (a) had said that no costs could be given upon a successful traverse, there being no property in such case in the hands of the crown, yet that in the present case, the inquisition was still subsisting, nothing have been done beyond the permission given to traverse it.

Mr. *Leach*, Mr. *Wetherell* and Mr. *Wingfield*, relied upon *Ex parte Ferne*, arguing that the rule of law laid down in that case would be evaded if the party were to be permitted to come and obtain an order for their costs, after permission had been given to traverse, but before the successful termination of the traverse.

\*THE LORD CHANCELLOR:—I am of opinion with Lord [\*110] Loughborough, in the case mentioned, and further think that the traverse having not yet succeeded makes no difference. The result of the traverse cannot vary the question of right. I lament, however, that I have not the power of giving costs, considerable expenses having been incurred with very proper motives.

(a) 5 Ves. 832.

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 1815.—Dyson v. Benson.
 

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## DYSON v. BENSON.

1815: 7th February.

After order for time to answer, a demurrer may be taken off the file.

MR. HART moved to take a demurrer off the file, as having been put in by the defendant in this cause, after he had obtained an order for six weeks' time to answer.

Mr. Treslove opposed the motion, upon the ground that the order for time had been obtained by the solicitor by petition at the Rolls, before he had received a copy of the bill, and merely to prevent an attachment, and that before the order was drawn up, which it had never been, the demurrer had been put in. He stated that this was a proper case to take the opinion of the court upon a demurrer, it being a bill filed by one partner against the other for an account without praying a dissolution of the partnership, and referred to *Forman v. Homfray*,<sup>(a)</sup> to show that such a bill could not be sustained.

[\*111] \*THE LORD CHANCELLOR:—If after one order for time to answer the defendant might demur, he might also demur even after a third order for time to answer. Perhaps it may be expedient to make some regulation allowing a defendant further time to demur than he now has; but according to the subsisting practice, this demurrer has been irregularly put in, and therefore must be taken off the file with costs.

(a) 2 Ves. and Beames, 329.

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 WRIGHT v. ATKYNS.

1815: 7th February.

Devise and bequest of real and leasehold estate to the defendant "and her heirs forever, in the fullest confidence that after her decease she will devise the property to my



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 1815.—Wright v. Atkyns.
 

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*family*," is an estate in fee at law, but only for life in equity, with a trust as to the inheritance. The decree at the Rolls affirmed, with this qualification as to the declaration of the party's right. S. C., 17 Ves. 255; 1 Ves. and Beames, 313. Words of confidence, if the object be certain, and the subject ascertained, in equity always create a trust.

A will devising real estates for life, with remainder "to the family," the heir at law is entitled under that term.

THIS was an appeal from the decree of the Master of the Rolls.

The testator, Wright Edward Atkyns, by his will, dated the 29th October, 1804, devised and bequeathed all his manors, messuages, farms, lands, tenements, advowsons and hereditaments, as well leasehold as freehold and copyhold, in Norfolk and Norwich, or in any other town, parish or place, next or near adjoining, with their appurtenances, and all other his real estates whatsoever and wheresoever, and of what tenure or tenures soever, unto his dear mother Charlotte Atkyns, and her heirs forever, in the fullest confidence, that after her decease she will devise the property to his \*family; and he thereby [\*112] subjected and charged the aforesaid hereditaments and premises with the payment of all his just debts that he should owe at the time of his decease. And he thereby gave and bequeathed to his aforesaid dear mother Charlotte Atkyns, all his goods, chattels and personal estate for her own benefit; and appointed her his executrix. The testator departed this life without leaving any issue, and the plaintiff, who was his uncle, was the testator's heir at law; and he was also entitled to two sums, 2,700*l.* and 1,000*l.*, as personal representative of a mortgagee; being also the trustee under a conveyance of the testator's father, subject to those mortgages upon trust for payment of the same by sale of the estates.

The bill was filed against Charlotte Atkyns as devisee and executrix, praying an account of what was due for principal and interest upon the mortgages, and that the defendant might be decreed to pay the same in case the court should be of opinion that she is entitled to the fee simple and inheritance of the estates devised; or in default of payment, or in case the court should be

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 1815.—Wright v. Atkyns.
 

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of opinion that the defendant is entitled to an estate for life only, and therefore not bound to pay the plaintiff, then that the same might be raised by sale of the estates.

By the decree at the Rolls it was declared that the defendant Mrs. Atkyns must be considered as only tenant for life of the hereditaments and premises mentioned in the pleadings, and that the plaintiff was entitled to raise by sale of the estates, or a sufficient part thereof, what should be found to be due for principal and interest in respect of the charge, and for his costs, and that what should be found due for interest since the defendant [\*113] took possession should be answered by her personally, and that what should be found due for principal and interest accrued at the time the defendant took possession of the estates, and the plaintiff's costs, when taxed, should accordingly be raised by sale of the said estates, or a sufficient part thereof.

The case was argued by Sir *Samuel Romilly* and Mr. *Heys* for the plaintiff; and by Mr. *Leach*, Mr. *Hall*, and Mr. *Bell* for the defendant. But the arguments and authorities made use of at the Rolls being already fully reported, and the same being also very much gone into and considered by the Lord Chancellor in his judgment, they are not here repeated. The case had stood some time for judgment, and on the above-mentioned day the Lord Chancellor gave his decision as follows:

This was a case argued some time ago, to the consideration of which I have since addressed my mind, in the hope that I should have been able to form an opinion more satisfactory to myself than the one I have formed. It was a case that came before the Master of the Rolls, and in which he made a decree, in August, 1810, and by that decree declared, that under the circumstances of the case, the defendant was to be considered only as tenant for life of the hereditaments and premises mentioned in the pleadings, and that the plaintiff was entitled to raise, by sale of the estates, or a sufficient part thereof, what should be found to be

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1815.—Wright v. Atkyns.

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due for principal and interest, in respect of a charge at the time the defendant took possession thereof, and that what should be found to be due for interest, since the defendant took possession, should be answered by her personally, and he ordered that what should be found to be due for principal and interest accrued to the time the defendant took possession of the estates, and the plaintiff's costs when \*taxed, should accordingly [\*14] be raised by the sale of the said estates, or a sufficient part thereof.

Upon this declaration in the decree, it appears to me inaccurate to state by a declaration that the defendant was only tenant for life; and if the decree is right, these words must be qualified by attending to the circumstances, that the defendant is tenant in fee at law under the will; but supposing the principle of the decree right, the fee simple at law is clothed with the trust for some person whenever the tenant in fee shall do some act, so that in equity the defendant is tenant in fee at law, and tenant for life in equity, and some other person is entitled to the inheritance after the death of the tenant for life.

Upon a point so important as that which is decided in this case, it appears to me to be a circumstance much to be regretted, that on a record framed as this is, that point should have been determined; but I agree that it was necessary to be determined, for the plaintiff being entitled to a charge on the estate, it would be difficult to say how the estate could be responsible for the charge so created between this lady, as the tenant for life in equity, and the person, if any person there is, who is entitled to the estate, if the interest of the charge must be kept down by the tenant for life. It was necessary, therefore, to ascertain whether the defendant was tenant for life in equity, and tenant in fee at law.

The will, a copy of which I have before me, is the will of Mr. Atkyns, the son of this lady, by which he gives all his manors, messuages, farms, lands, tenements, advowsons and heredita-

ments, as well leasehold as freehold, in Norfolk and [\*115] Norwich, or in any \*other town, parish, or place, next or near adjoining, with their appurtenances, and all other his real estate whatsoever and wheresoever, and of what tenure or tenures soever, unto his dear mother Charlotte Atkyns, and her heirs forever, in the fullest confidence that after her decease (by which he must have meant at her decease), she would devise the property to his family: and there follow words which it appears to me are important to state, and which I observe are not part of any printed or written report that I have seen; but which have a tendency to show what the testator had in contemplation, when he used these words, "in the fullest confidence that after her decease she will devise the property to his family." After charging the premises with the payment of his debts, he goes on to say, "and I do hereby give and bequeath to my aforesaid dear mother Charlotte Atkyns all my goods, chattels, and personal estate for her own benefit," and then he makes her his executrix. The personal estate is given by words which express to give it absolutely for her benefit. With respect to the real estate, if the former part of the will is to be looked to, it is a question of real estate only, which is given in the fullest confidence that after her decease she will devise the property to his family. It is given to her and her heirs forever, which, as it appears to me, must vest the legal interest; then follow words of confidence, which, if the object be certain, and the subject ascertained, are always taken in this court to create a trust.

With respect to the words of confidence, that they are sufficient to create a trust, there can be no doubt. As to the subject about which the confidence is expressed there can be also no doubt, for the words are, "the property." As to the object, the object is described under the words "my family," and [\*116] the question is, \*whether the words "my family" sufficiently ascertain the object in whose favor this confidence is expressed with respect to the subject? It is observable, that the confidence expressed with respect to the subject and object is, that she will do a certain act, viz., that she will devise the

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 1815.—Wright v. Atkyna.
 

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property to his family. That, therefore, *prima facie* seems to import that she has till the last moment of her life the power of doing the act, which the testator expresses his confidence that she will do, and when she is doing that at the last moment of her life, the terms with reference to which this confidence is expressed *prima facie*, import that the object, in respect of whom the confidence is not to be violated must be some object to whom she can pass the estate by devise.

On the argument and consideration of this case, I have been distressed by two circumstances; the one is, that I observe his Honor, in giving his judgment, and the printed report is confirmed by the written report, states "with respect to the cases cited, which relate to personal property, or to real and personal property, comprised in the same devise, or where the meaning is rendered ambiguous by other expressions or dispositions, they will not bear, upon the question." He further represents correctly what Lord Hardwicke said in *Pyot v. Pyot*,<sup>(a)</sup> that "the Pyots" described the particular stock, and that the name stood for the stock, but did not go to the heir at law, as in the case in *Dyer*; <sup>(b)</sup> it must be nearest relations; taking it out of the stock; from which case it also differs as the personal is involved with the real; and it was meant that both should go in the same manner, and could the personal go to the heir at law?

\*You will observe, that if the testator had had any [\*117] leasehold estate, or had acquired any, prior to the time of his death, that this would have been a case of a mixed devise and bequest of personal and real estate; for it is not, as the argument represents, a case of the devise of the manors, messuages, farms, lands, tenements, advowsons and hereditaments; but the words are, "I give, devise and bequeath all my manors, messuages, farms, lands, tenements, advowsons and hereditaments, as well leasehold as freehold," in the manner described.

Another circumstance that has distressed me in the consideration of the case before me is this; the word "family" has been

(a) 1 Ves. 335.

(b) *Chapman's Case*, Dy. 333.

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understood, and it has been insisted, that it has been used ever since the case in Dyer, which is confirmed by the case of *Cunden v. Clerke*,<sup>(a)</sup> where the real estate is given to a man "the best and worthiest of the family," that is the heir at law of the family; and there can be little doubt, after what one sees of decisions, that if this had been a will devising the real estate to the defendant for life, with remainder to his family, that these words, "his family," would be taken to describe his heir at law. But as far as I have seen, with reference to the argument or judgment in this case, it does not seem to me to have been in discussion before his Honor, or that his judgment adverts to the circumstance that this is not a case where the word "family" is to be considered with reference to the occurrence of the word in the text of the will; but with reference to the nature of the confidence and the act to be done, in order that the person to whom the estate is devised in fee may, if I may so express it, be capable of benefiting by the act, duly attending to the confidence [\*118] reposed, in giving to the person described by the words "my family." For unless that person is certainly described by the words "my family," this trust cannot take effect. And perhaps the statement I am making is material, as having some countenance in the mind of the learned judge.

It is impossible not to have been anxious in respect to this case, and in respect to a late case in Taunton,<sup>(b)</sup> and another in the 1 Term Reports, 487, Note; and I note it as extremely to be lamented that all the cases had not, upon each of these questions, been thoroughly looked into when this judgment was given, because it is extremely difficult to reconcile the representations of these cases in law and equity. If anybody will take the trouble to look into the case of Spring on the demise of *Titcher v. Biles*, in the note to 1 Term Reports, 485, they will find Mr. Justice Buller disputing whether the doctrine of trust and confidence relates to real estate; they will also find him stating, that where there are words of confidence that a person will give it

<sup>(a)</sup> Hob. 33<sup>(b)</sup> 1 Taunt. 263, 266.

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to his relations, that it means next of kin; and there are cases in this court that seem to go on that. In this note the case of *Harding v. Glyn* is also referred to, in which case Sir Samuel Romilly and myself were afterwards concerned. The result there was, not that the widow, to whom the property was given, was bound to give it to the next of kin; so much otherwise that she gave it to a person of the name of Henry Swindell, who was not next of kin. He was a defendant with his father, who was next of kin, so that the son could not be next of kin, and the decree confirmed the title of the son to that part of the property which the widow had \*bequeathed to him, and the effect could be no more [\*119] than this, that if she did not give it to the person who answered the description of the relation, that the word "relation" would operate in favor of the next of kin, with this difference, that the next of kin would take as the relations, yet they would not take in the same proportions which the next of kin would take under the statute. That principle was followed up in *Thomas v. Hole*,<sup>(a)</sup> and in the case of *Hands v. Hands*,<sup>(b)</sup> which was determined in 1782. It appears that the notion of the Master of the Rolls, at that day, who decided the cause, was, that although where there was a trust of that sort for relations, it might be in the power of the party in whom the confidence was reposed to disappoint the expectations of the relations, where they were next of kin, yet that unless these expectations were actually disappointed by the act of the person in whom the confidence was reposed, they had that species of interest in the property which would entitle them to sue in this court, and to have the property secured by being brought into court, and the court would secure it from some other person not entitled to it under the trust which was created under the words of confidence. The case of *Harding v. Glyn* and *Hands v. Hands*, had express reference to giving the property at the death of the person in whom the confidence was reposed. I mark the circumstance as bringing this case, as far as the power of devising goes, within the

(a) Cas. Temp. Talbot

(b) Cited 1 Term Rep. 251, 437.

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reach of the cases decided. But I do not think it is necessary to attend to the power considered specifically as a power to give by devise, for if the party has a power to give, whether the words devise or bequeath are introduced or not, as a power she must have a right to exercise the power at any part of her [\*120] life, and therefore might \*be capable of exercising it by some future act, and that may be a future act that cannot be executed at that time, for it is to be executed in favor of persons who are then living, and who must answer the description of next of kin of the person who reposes the confidence in the person who is to do the future act. In the case of the word "relations," generally speaking, one has to observe this, that relations not only imply next of kin, but other persons who are related in much more remote degrees, and that where there is a power of giving or devising to relations, the power which reposed confidence, or expressed the trust, applies to a great variety of objects, among whom the power might be exercised: and yet it is not impossible that a case may exist where a testator reposing such confidence may die with only one individual surviving, who would answer the description of relation; and I think it would be found difficult to say, that because only one individual could be represented as the object in the favor of whom the trust was expressed, that a different construction was to be put upon such a will, from what would be put on a will in which *ex concessis* it was admitted that there were a variety of objects certainly described, or to be made certain by the act which adopted them. It would be a difficult thing that the decision of the court should be different in one case from what it would be in the other. Now it is in some such sort of way as this that I have considered all the difficulties pressed on me against the authority of the decision of the Master of the Rolls, and I should have found satisfaction if I could have found in the decision assistance to my mind.

What has been said as to the power of devising real estates when it has been pressed on me, and pressed at my suggestion, is this; why should the [\*121] \*testator have given



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this lady a power of devising, if by the words "my family" he only meant his heir at law? On the other hand it has been said, why should he describe her mode of leaving as a gift to be made by devise, if he meant his heir at law who might be dead before her? and that argument carries weight from the reasoning of the judges in the case to which I have alluded in the Term Reports. It carries weight from the judgment, and speaking with all humility, more weight than that judgment would have given the argument if the judgment had been considered with reference to all the decisions in this court. But with respect to the first of these objections, that it is a power to devise to the heirs of the family, it appears to me that there is no difference between that case, and the case that might occur where the trust was with respect to personal estate, and the person who expressed the confidence had but one relation in the world; or the fact that that relation might be dead before the power could be executed by will, and, therefore, that as a confidence or trust reposed, it must cease to operate, because the trust and confidence could not be executed in the mode the testator had appointed it should. My answer to that is, that if the word "relations" is to be taken as next of kin, or if it so happen that there is no relation but the next of kin, in all cases where the power of giving personal estate is to be exercised in future, which it must be, for it must be exercised by a future act of gift or bequest; and it appears to follow in this case that the court has overlooked the objection, or has not thought it of sufficient weight to destroy the trust, but has said that if these persons should die, and not be disappointed by any act of the party interested, notwithstanding they could not be the objects, they shall take.

\*The result of the whole amounts to this. I pass over [\*122] the case of *Harland v. Trigg*,<sup>(a)</sup> in which it was impossible that the words "my family" could mean an heir at law. I remember the case myself, and I have had frequent occasion to mention the case in *Dyer*, and the case in *Ambler*.<sup>(b)</sup> In the

(a) 1 Bro. C. C. 142.

(b) *Cunliffe v. Cunliffe*, Amb. 686.

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case of *Harland v. Trigg*, there was not a word said about family ; it was impossible to say anything with effect ; because the argument was, that the testator had given leasehold estates to the same uses as his real estates, and had expressed that the leasehold estate should be given to his family. It was thereupon contended by those who took interests in remainder, that the testator meant that these leasehold estates should go along with his freehold estates. Two answers were given, 1st, that he had clothed his leasehold estates with the use of his real estates ; and next that the estates which were not so clothed should go to the same uses. They were not contending for the word "family," because the testator had two daughters who were his co-heiresses at law and next of kin ; therefore, unless you made out from the context that by the word "family" he meant remainder-men, you did not advance a step. When I say unless you made it out from the context, I admit that the words "my family" have been words that have had constructions more or less large. The cases at law amount to this, that if a man devises to 'A. B. with remainder to his family, inasmuch as the court never will hold a devise to be too uncertain, unless no fair construction can be put upon it, that the heir at law, as the worthiest of the family, is the person taken to be described by the word "family." Therefore, in this case if this had been a devise to Mrs. Atkyns, in terms which would have regulated the quantity of [\*123] estate at law ; that is, if it had been to Mrs. \*Atkyns for life, with remainder to "my family," that would have been remainder (subject to a question whether the heir at law took by descent or purchase) descriptive of some heir at law. If that would have been so, the question arises whether the power of devising, and the fact that the heir at law may be dead before the power can be executed, makes any difference ? and I have alluded to the cases I have mentioned for the purpose of pointing out the difficulty of establishing consistently with the cases the doctrines laid down.

In this case the leasehold estates are expressly mentioned among the gifts with respect to which the confidence is expressed.

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1815.—Wright v. Atkyna.

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I have observed the fact does not seem to have been taken notice of, or to have been mentioned at the bar, that the testator mentions leasehold estates, though he has none. Not that his having no leasehold estates makes any difference; for by his mentioning that she may dispose of leasehold estates, you must take him to have the same intention as to leasehold as to freehold estates. Then the difficulty occurs to which the Master of the Rolls alludes, and which Lord Hardwicke states in the case of *Pyot v. Pyot*; and yet this difficulty has been got over in later cases, for in the case in the Common Pleas, and in the case in the Term Reports, where the word relation is used, both courts said, that the words "my relations," relating to real estate, shall receive the same construction as with respect to personal estate. Then if they will receive the same construction as real estate, as with respect to personal estate, it is difficult to say *per contra*, that the words "my family" shall not receive the same construction with regard to real and personal estate. I have a difficulty with respect to the decision in the year 1732, which is mentioned in the note in Taunton's \*Reports, before re- [\*124]ferred to, the manuscript of which I understand was from among the papers of the late Mr. Cox, where the word "family" was used, that it gave the real estate to the heir at law, and the personal estate to the next of kin. It is not necessary to say, whether that decision would not be open to considerable question. There was no real estate there, so that there could be no competition about it; but it would be too much to say, after it had been held that the word "relation" by analogy to the Statute of Distributions will give the real estate, that the word "family" will not give personal estate. Whether that can be maintained, or the decision in 1732, makes no difference in this case.

There was a case which I have taken a good deal of pains to find out. It happened early in the period in which I have lived in Westminster Hall. It was a case in the family of a Mr. Morris, of the Western circuit, whom many must remember. It is a case which I am sure would be found to bear on this, if we

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 1815.—*Kemeys v. Hansard*.
 

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could get at it. It was the practice at that time of day (I am alluding to an old period) that you had no such doctrine in a court of equity, as that a man was obliged to take a doubtful title. Of that there was no doubt. If a bill was filed for the specific performance of a contract, and the court compelled you to take the title; if you did not like it you applied to the House of Lords, and took its opinion on the title, and though the opinion of the House of Lords would not bind those who were no parties to the suit, it would form a precedent to go by in future. With respect to the will of Mr. Morris, there was, as I said, a question in his family, and though I cannot take upon myself to say how far it bears on this case, yet I have a strong [\*125] impression on my mind that it \*does bear on it under some such devise as is contained in this will. An agreement was made for the purchase of the estate; the question was first discussed in the Exchequer, and afterwards in the House of Lords, and there "confidence" was held, as by the Master of the Rolls in the present case, to amount to a trust. I have not been able to trace the case, so as to state the circumstances of it in such a way as to induce me to represent it as any authority for the inclination of the opinion I have formed in looking to this case, in the midst of all the difficulties with which it is surrounded. I have no hesitation in stating this case to be of so much importance and difficulty, that I should have no objection to hear it again discussed in argument, or made the subject of appeal elsewhere, in order that a point of this magnitude may be left with less uncertainty than now hangs about it. But my present opinion is, that I cannot disturb the judgment of the Master of the Rolls.

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*KEMEYS v. HANSARD.*

ROLLS.—1815: 7th February.

Notwithstanding two private acts of Parliament reducing younger children's portions in proportion to the other interests in the estate; the court would not enforce an agreement entered into by one of the younger children in execution of the private

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acts, thereby consenting to accept a stated sum in satisfaction; such agreement being inserted by the plaintiff's solicitor in a receipt from her, on paying her a small sum of money, and she being in great distress and embarrassment at the time.

By settlement, dated the 14th and 15th April, 1756, made upon the marriage of John Gardner Kemeys and Jane his wife, the father and mother of plaintiff, certain estates were conveyed to trustees, among other trusts to raise the sum of 4,000*l.*, for the portions of younger children, payable at twenty-one or marriage. There were two such younger children of the marriage, \*Jane Gardner Kemeys and Susannah Kemeys. Jane [\*126] Gardner Kemeys, in the year 1779, intermarried with Hansard, of much inferior station in life, and without the approbation of her family, and the defendant was the issue of that marriage. Hansard, the defendant's father, carried on the business of a seedsman, and afterwards failed, and was committed to the Fleet prison, where he died. It appeared that the defendant's mother was left a widow, in such distressed circumstances as to have been arrested for the amount of her husband's funeral expenses. Under these circumstances she applied to the plaintiff, her brother, for payment of her portion, who referring her to his solicitor Fownes, a verbal agreement was in 1808 entered into, by which she seems to have consented to accept the sum of 1,780*l.*, on account of her portion. It appeared, that on the 24th February, 1809, Fownes paid to the widow, at his office, the sum of 20*l.*, on account of interest of the said 1,780*l.*, and thereupon Fownes made her sign a receipt as follows: "Received the 24th February, 1809, of J. K. G. Kemeys, Esq., by payment of Messrs. White and Fownes, the sum of 20*l.*, on account of the half year's interest of 1,780*l.* due to me in November last, which said sum of 1,780*l.*, I agree to accept in full of my claims on him and his estates, and to execute a release for the same, on its being paid or secured to me." Other small payments were afterwards made to the widow, who died in 1811, leaving her daughter, the defendant, her executrix. The defendant refusing to abide by the agreement, the plaintiff filed the present bill, praying a specific performance of it.

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 1815.—*Kemeys v. Hansard*.
 

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Two private acts of Parliament<sup>(a)</sup> had been obtained by the plaintiff, but without the concurrence of, or even consulting with his sisters. The effect of these acts \*was to provide for a debt due from his father to the crown, and for moneys due upon mortgage, and to secure a *proportionable provision* as the portions of the younger children, in consequence of the reduced value of the estates.

The defence made by the answer was, that 1,780*l.* was not a fair proportionable part of the ~~aid~~ portion, and that the agreement to accept it was unduly obtained from the defendant's mother, who was at the time under great distress and embarrassment in her circumstances, and that the plaintiff's conduct amounted to duress towards her.

Mr. *Leach* and Mr. *Wetherell*, for the plaintiff, relied upon the receipt as evidence of the agreement, and upon the payments made as constituting acts of part performance. They contended that 1,780*l.* was doing proportionate justice to each of the daughters under the acts of Parliament, and that the agreement to accept it was such a one as a court of equity would enforce.

Sir *Samuel Romilly* and Mr. *Dowdeswell*, for the defendant, objected to the receipt as insufficient evidence of the agreement, there being no confirmation of it. It was also improperly obtained from the defendant's mother, not being explained to her, and advantage being taken of her distressed situation. It was void for want both of consideration and mutuality according to the decisions both at law and in equity. The private acts do not bind the defendant or her mother, neither having been party to them, and there being great uncertainty as to the benefit which those acts provide for the younger children.

[\*128] \*Mr. *Leach* in reply.—The private acts were beneficial to the defendant's mother, as without them her

(a) 12 Geo. III, and 34 Geo. III.

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1815.—*Kemeys v. Hansard*.

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only remedy would have been to have redeemed the incumbrance on the estates.

THE MASTER OF THE ROLLS:—The bargain which was entered into might be a good one for Mrs. Hansard. I don't know how that may be. The question is, whether this court should decree a specific performance of it? Now there is abundant evidence that she entered into an agreement. It is contained in the receipt, and that will do as well as in a distinct instrument for the purpose; but I think it has not been properly introduced there. The original agreement was by parol, not very distinct in itself; and the receipt is an acknowledgment of it, which was not intended to have been given by Mrs. Hansard. She went to Mr. Fownes, not for the purpose of signing an agreement, but in order to receive a small sum of money; but which he would not pay unless she would sign the agreement. It ought to have been stated to her what she was to sign, which it was not; but appears to have been extorted from her. Neither was it any conclusive agreement. On entering into it she certainly meant to have her money down; whereas she was only paid some trifling sums. In the circumstances in which she was, it made all the difference to her that the money should be paid down. She was so distressed in her circumstances that she appears even to have been arrested for the expenses of her husband's funeral. The plaintiff says he meant to pay her at his convenience, and that she was satisfied so to be paid the 1,780*l*. But no benefit resulted to her from such an arrangement, and even the acts of Parliament leave her interests in a state of complete uncertainty. I \*therefore think that the agreement was ob- [\*129] tained from her under such disadvantageous terms, that this court, upon its general principles, will not enforce; nay, indeed, ought not to enforce, for the sake of the precedent. The bill, therefore, must be dismissed; but there being no evidence of fraud, let it be without costs.

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 1815.—*Waugh v. Land.*


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*WAUGH v. LAND.*

1815: 7th and 9th February.

Tenant in common of a moiety having obtained a decree for redemption of his moiety, afterwards takes a conveyance of the equity of redemption of the other tenant in common, and then files a supplemental bill for a redemption as to that; stating that a prior conveyance of that equity of redemption by the assignees of that tenant in common, who had been a bankrupt, and in which conveyance the bankrupt had joined, was void as against the bankrupt, having been improperly made. Bill dismissed, being supported by the evidence of the bankrupt alone.

A bankrupt cannot be compelled to join in a conveyance by his assignees.

THE bill filed in this case was filed as a supplemental bill. It stated, that in 1802 the plaintiff had filed his original bill against the defendant Land and some of the other defendants, for a redemption of a moiety of a dissenting chapel at Leeds. In 1793, the plaintiff and Price, one of the defendants (plaintiff and Price being dissenting ministers), had purchased and taken a conveyance to themselves as joint tenants of a piece of ground, on which they began to build the chapel in question. By indentures of the 8th and 9th July, 1793, the plaintiff and Price mortgaged the premises, and the chapel then erecting, for 300*l.* to Pawson and Lee. The chapel was afterwards finished at a considerable expense, and by indentures of the 19th and 20th January, 1795, the plaintiff and Price, together with Pawson and Lee, who joined in assigning their interest, conveyed the ground and chapel to the defendants Land, Lonsdale, Howell [\*130] and Lawson, to secure, in the \*first place, the said 300*l.* and interest, thereby conveyed and assigned to the said defendants; and further to secure other moneys advanced by them towards building the chapel, stated at 1,812*l.* In March, 1795, the plaintiff and Price were declared bankrupts, by selling books, they being schoolmasters, and the defendants Waggit, Miers and Reynolds were chosen assignees of their estate. Price soon after obtained his certificate. The said commission of bankrupt was stated to be fraudulent and collusive, as against the plaintiff. In February, 1799, the plaintiff brought an action



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1815.—*Waugh v. Land.*

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of trover against the said assignees, in order to try the validity of the said commission, and having obtained a verdict therein, the commission was afterwards superseded by order of the Lord Chancellor, on the 26th January, 1802. By the decree at the Rolls, in Easter Term, 1807, it was declared, that the plaintiff was entitled to redeem his moiety of the said mortgaged premises, and the usual accounts were directed.

The bill now filed, after reciting the above proceedings, stated by way of supplement, that by indentures dated the 21st and 22d July, 1807, between Price of the one part, and the plaintiff of the other part, in consideration of 425*l.* secured to be paid by plaintiff to Price, the latter had conveyed to the plaintiff and his heirs all that his (Price's) moiety or half part of the said ground and chapel. That since the above decree the plaintiff had discovered that the said assignees had acted fraudulently and collusively in selling the equity of redemption of the said ground and chapel to the defendants Land, Lonsdale, Howell and Lawson. It stated, that Price was improperly prevailed upon by the said assignees to join in the said conveyance of the equity of redemption, under the persuasion, that as a bankrupt \*he [\*181] was bound to join in the conveyance by his assignees; but that he had only executed as a formal party, without consideration, and that he never would have done so, if he had known or believed that the commission of bankrupt against him and the plaintiff was not valid, and would be superseded. The plaintiff therefore insisted, that having purchased and taken a conveyance of Price's moiety, he was entitled to redeem the same, notwithstanding the prior conveyance of the said assignees, in which Price had so joined, to Land and the others.

The bill prayed, that it might be declared by the decree of the court, that the deed or deeds by which it was alleged that Price had conveyed or released his equity of redemption in the said mortgaged premises, were void as against plaintiff and Price, and that by virtue of the indentures of the 21st and 22d July, 1807, the plaintiff was entitled to redeem, as well the moiety of Price as

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1815.—*Waugh v. Land*.

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the plaintiff's original moiety; and that the necessary accounts might be taken.

The answers of all the defendants, except Price, denied all the fraud and collusion stated in the bill, or that Price had been improperly prevailed upon to convey the equity of redemption, under the circumstances represented in the bill; but the same was a fair and *bona fide* sale, and that he had joined with the said assignees in conveying the same by indenture of the 21st March, 1796. Price, by his answer, admitted the above statement in the bill. There was, however, no evidence on the part of the plaintiff in support of the fraud and undue influence stated by the bill, except the evidence of Price, who was examined as a witness for the plaintiff, and who deposed to the effect stated in his answer.

[\*132] \*Sir *Samuel Romilly* and Mr. *Wear*, for the plaintiff, argued that he was entitled by the present bill to have a decree for a redemption of the moiety which he had purchased of Price; and that the defendants should have made their objection, if there was any weight in it, by demurrer. The question as to Price's right to redeem his moiety could not have been decided in the original cause. A decree might be made as between the defendants to the present suit, as was commonly done in causes where there are several incumbrancers of the same estate. So in bills of interpleader, decrees are made between defendants upon evidence between them.

The LORD CHANCELLOR, in the course of the argument, observed that this was the first instance of a person filing a bill, stating that another person had been defrauded of his right; that the plaintiff had bought that right, and now sued upon it. That there seemed two convenient modes of putting the question for decision, either by demurrer or by plea.

Mr. *Leach*, Mr. *Agar* and Mr. *Bell*, for the defendants, insisted that a right of this sort could not be purchased, it being contrary

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1815.—*Waugh v. Land.*

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to the policy of the law ;(a) and that a supplemental bill could not be filed in this case, or the evidence of Price entitle the plaintiff to relief under it, even if that evidence were at all admissible.

THE LORD CHANCELLOR :—In this case the plaintiff and Price were originally joint tenants of the premises in question ; but that makes no difference as to the question to be decided in this \*suit, though it seems to have been thought that it [\*183] did. The original bill filed charged, that by collusion the commission of bankruptcy issued against the plaintiff and Price ; but that is omitted in the supplemental bill. The trading, however, in school-books was not sufficient to constitute a trader within the meaning of the bankrupt laws, and the commission therefore was certainly bad. As to the supplemental bill, I cannot help observing, that if it was meant to claim a right to redeem a moiety only, it seems oddly framed for that purpose, it being difficult to know from the prayer of it whether a redemption of the whole is not claimed by it. The conveyance of the equity of redemption is material in this case. There is great difficulty as between the defendants in getting rid of the fact of Price having joined his assignees in that conveyance. The court is obliged in this case to decide as between the defendants. The case mentioned of incumbrancers is different, because there the court by reference to the master first gets his report, thereby ascertaining the facts before it decides.

I know not under what class or denomination of pleadings this bill is properly to be ranked, whether it is a bill of review upon new evidence, filed without leave of the court, or what it is. It states part of the allegations of the original bill, and alleges a discovery of fraud and collusion, as to the conveyance of the equity of redemption by Price. Not one syllable of this fraud or collusion is either admitted or proved. No passage in either of the answers has been read in evidence ; and lest there should have been a slip of attention in the counsel, I have my-

(a) Stat. 32 Hen. VIII, c. 9.

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 1815.—Weston v. Haggerston.
 

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self read the answers through, and find that no passage could have been read in evidence. Considering the case then even upon the allegations of the bill, I cannot see that fraud [\*134] \*or collusion has been practiced upon Price. It is not sufficiently stated, nor indeed is it at all stated, as it should have been, that the other defendants had notice of such fraud or collusion before they became purchasers, without which no relief could be given against them. If, however, there were sufficient allegation of this, there is not the least evidence of it. Suppose Price had filed a bill, he could not himself give evidence to destroy his own deed; if so, his assignment to another cannot enable that other to use Price's evidence for the same purpose. The evidence of Price then is nothing at all in the case; the allegations of fraud in the bill being denied by all the other defendants. As to his having been compelled by his assignees to join in the conveyance of the equity of redemption, no bankrupt can be compelled so to join. If a purchaser does not like the title unless the bankrupt joins, he certainly often does so, but he cannot be forced to it. As a judge, I have not upon the whole the least doubt that this bill must be dismissed.

Bill dismissed with costs.

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### WESTON v. HAGGERSTON.

1815: 10th February.

After enrollment of a decree, errors appearing upon the face of schedules permitted to be corrected upon motion without a bill of review; but the court would not permit an affidavit introducing a new fact to be used for that purpose.

In taking an account in the Master's office the following mistake was made in casting up the schedules: the Master had carried forward the balance from one schedule to the next, and the balance of that to the following, and so on, through several schedules; but instead of charging the defendant with [\*135] the balance only \*appearing by the last schedule, which

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1815.—*Weston v. Haggerston.*

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included the other balances, he had cast up all the different schedules, and charged the defendant with the amount of the whole, thereby charging him with several thousand pounds more than he ought. The defendant upon the cause coming on for further directions was decreed to pay the sum so reported due from him. The plaintiff then enrolled his decree, after which the mistake was discovered. The question was, whether the error could be rectified upon a summary application to the court, or whether the enrollment having taken place, did not render a bill of review necessary.

Mr. *Bell* and Mr. *Heald*, in support of the application when it first came on<sup>(a)</sup> which was some time back, cited several cases from the register's book, to show that such an error could be corrected notwithstanding the enrollment, without the necessity of a bill of review, and also referred to several authorities at law in which mistakes in records at law had been permitted to be amended.

Mr. *Agar*, on the other side, insisted, that a bill of review was necessary.

The LORD CHANCELLOR thought that all errors apparent upon the face of schedules could be rectified, even after enrollment; but that there could be no correction except of such apparent errors, and therefore that the mistake which had been made in the schedules in this case might be rectified.

Mr. *Agar* afterwards, on the first above mentioned day, applied upon affidavit for the plaintiff to have some further sums allowed him which he claimed, and which he [\*136] contended ought to have been inserted in the schedules, and that as the defendant had on his part been permitted to correct a mistake in the account, a similar indulgence ought to be given to the plaintiff.

(a) This part of the case *ex relatione*.

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 1815.—Bootle v. Blundell.
 

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THE LORD CHANCELLOR:—I remember being satisfied upon the authorities stated to me, when this case was on before, that any error apparent upon the schedules might be rectified. But I am of opinion that no affidavit introducing a new fact can be permitted after enrollment. As to any error in charge or discharge appearing upon the report, it may be corrected. Though interest should be allowed on apparent balances, I think also that if those apparent balances should not appear to be real balances, the party would not be entitled to interest upon them. I cannot, however, send it to the Master to inquire into errors of an enrolled decree, appearing only by affidavit. In permitting the amendment which I before thought might be made, I never meant to interfere as if the enrollment had not taken place.

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 BOOTLE v. BLUNDELL.

1815: 9th, 10th and 13th February.

On the trial of an issue *devisavit vel non* directed by this court, all the witnesses to the will should be examined.

AN issue *devisavit vel non* having been directed by this court, the case was tried at the last assizes for Lancaster, when the attorney-general, who had gone down special for the plaintiff, having called one witness to the will and examined him, did not call the other two, but told the counsel on the other side, [\*137] that he \*would make a present of the other two witnesses to the defendant. The defendant, however, did not examine them, being advised not to go on with the trial, and a verdict was accordingly found for the plaintiff.

Sir Samuel Romilly and Mr. Roupell now moved for a new trial, and contended that all the three witnesses to the will ought to have been examined, the rule of proceeding in this court being that where the witnesses to a will are living they must be ex-

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1815.—*Boote v. Blundell*.

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amined, and that an issue being part of the proceedings of this court, and not a distinct action, the same course must be pursued.

Mr. *Hart* and Mr. *Hall*, on the other side, contended that the rule of the court was a mere technical rule, confined to examinations before its own officers; that upon an ejectment at law it was quite unnecessary to examine all the witnesses to a will; and that an issue being only a mode of informing the court by *viva voce* examination, the practice at law as to calling witnesses must be followed in an issue the same as in all other cases.

The LORD CHANCELLOR, however, thought that the rule of the court where a will is to be established, as to the examination of all the witnesses, was not a technical rule. Upon an action directed, the verdict is final; but when this court sends an issue to be tried, it reserves to itself the review of all that passes. This is the reason why the motion for a new trial, in the case of an issue, is to be made here, though it is not so in the case of an action.<sup>(a)</sup> The court is bound generally to decide a question of devise by a jury. It was decided in a case before Lord Hardwicke in 1737, and it is quite settled \*that a will [\*138] cannot be established in this court without the three witnesses to it being examined. Those three witnesses are not the witnesses of the one party or the other, but the witnesses of this court. The issue also is part of the proceedings of this court, and is so considered upon the motion for a new trial. It is not like an ejectment. There would be an inconsistency in requiring by the rule of this court that all the three witnesses shall be examined here except in cases of necessity, and dispensing with their being all examined at law. His lordship therefore was of opinion, that upon all such issues being tried in future, the three witnesses to the will should all be examined; but it appearing in this case, that the defendant had upon the trial given up the question as to the execution of the will, and consented that a verdict should go against him, the motion for a new trial was therefore refused.

(a) *Vide Ex parte Kensington, in re Stein, Smith, & Co., ante, 96.*

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1815.—Noel v. Weston.

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## NOEL v. WESTON

1815: 10th February.

Motion against purchasers in the Master's office, to pay in their purchase-money, refused, the estate sold being copyhold limited for life, and then in remainder, and the remainder-man being abroad, he not having surrendered.

UNDER a decree in this cause copyhold estates had been sold, which had been charged by the will of the testator with the payment of his debts, and subject thereto an estate for life to one defendant, with remainder to another defendant in the cause, were thereby limited, one of which defendants, namely, the remainder-man, had gone abroad, and so could not surrender to the purchasers. The purchasers had not been let into possession.

[\*139] \*Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Bell*, now moved that the purchasers might pay their purchase-money into court, and argued in support of the motion, that the remainder-man being abroad was not a sufficient objection to it any more than the infancy of a party in the cause, who, when he comes of age, is directed to convey. This was done in a suit instituted for the administration of the estate of the late Lord *Waltham*, where a sale of leasehold estate had taken place under a decree of the court, and the purchasers were compelled to take the conveyance notwithstanding the infancy of one of the parties. The order of the court constitutes a sufficient security to a purchaser. So in this case the remainder-man is before the court and must convey.

Mr. *Leach*, for some of the purchasers, opposed the motion :—The case of an infant forms of necessity an exception to the general rule, otherwise no sale could take place. Purchasers, too, have notice of that fact when they buy. But the rule is, that persons adult must convey. Suppose a case in which no conveyance at all can be made, surely a purchaser would not be obliged to pay his money. He could not sell or assert any legal right whatsoever. But this is a case in which there is no sur-



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1815.—Noel v. Weston.

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render by the remainder-man. He never may surrender, or fifty years may elapse before he comes within the jurisdiction. He may then be unwilling or unable to pay the fine due to the lord before the surrender can take place, and must the purchaser run this risk? Suppose he dies without assets, it is quite clear the heir cannot be compelled to pay the fine. But in the case before the court the sale took place under printed conditions of sale, by the fifth of which the vendors engage expressly to procure the\* surrenders. Till this is complied [\*140] with the application is premature.

Mr. *Benyon* for other purchasers:—The legal estate must be admitted to be in the remainder-man, and the question, therefore, is, whether the purchasers can be compelled to take only an equitable title? Now there is only one exception to the general right of purchasers in the Master's office to have a legal title, and that is in the case of an infant; that exception is founded upon the fiction that parties when they buy know the state of the record, and therefore have notice of the infancy.

Sir *Samuel Romilly* in reply :—I admit that I cannot produce a case like this; but I cannot see the distinction between the case of an infant and the present one. It would be highly absurd to suppose that case depended upon the principle of *lis pendens*. This is the case of a gentleman domiciled here, but who has merely gone to a *British* settlement. Suppose the case of an heir, being a *feme covert*, who refused to levy a fine, yet I apprehend the court would compel the purchaser to accept the conveyance. It has never been decided that such a title as this is not marketable, and cannot be forced on a purchaser. The admission of the tenant for life is clearly in law the admission of the remainder-man. As to the fine, if it had only been paid on the admission of the tenant for life it might be different; but even then when the parties applied to have the moneys paid out of court, that might be arranged.

THE LORD CHANCELLOR :—The court would struggle to get

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1815.—*Smith v. Smith.*

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over an objection to an application of this sort; but if [\*141] it is coupled with \*such a circumstance as that some time may elapse before the surrender or conveyance is got, it would hesitate before it made the order. In the case of an infant, the purchaser has no reason to complain. But in this case the court declares nothing upon its records as in the case of infancy. The non-compliance with the conditions of sale may in this case annul the contract.

Motion refused.

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SMITH *v.* SMITH.

1815: 13th February.

Plaintiff not entitled upon paying the common costs of amendment, to change entirely the nature of his bill, as by converting a prayer for an account against a bailiff into a bill to foreclose a mortgage, after an issue against the plaintiff, finding him a mortgagee.

SIR SAMUEL ROMILLY, followed by Mr. *Bell*, moved, on the part of the defendant, that it might be referred to the Master to tax the costs of the defendant up to the time of filing the plaintiff's supplemental bill, and that the plaintiff's amended bill might be taken off the file.

The original bill was filed against the defendant as the bailiff or agent of the plaintiff, as to a moiety of certain farms, and praying an account against him upon that footing. By an order, dated the 28th July, 1810, an issue at law was directed to try whether the plaintiff was or not a mortgagee of the said moiety of the said farms. Upon the trial of that issue the jury found a verdict against the plaintiff that he was such mortgagee.

On the 13th June, 1812, the plaintiff obtained the common order to amend his bill, thereby stating the said transaction of mortgage, and converting his former prayer of relief into a prayer of foreclosure of the said mortgage.

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1815.—*Smith v. Smith.*

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On the 8th December, 1812, the plaintiff filed a supplemental \*bill upon the said transaction of mortgage. [\*142] To that supplemental bill the defendant had put in an answer.

In support of the motion, it was argued that in this case the defendant was entitled to more than the ordinary costs of amendment, the original suit having been abandoned in consequence of the issue, and an amended bill of a totally different nature, and afterwards a supplemental bill having been filed: and the case of *Bullock v. Perkins*(a) was referred to.

Mr. *Leach* opposed the motion, because the defendant had put in an answer to the supplemental bill, and thereby waived all objection. The original, amended and supplemental bill are to be taken together as one; answering the supplemental bill is therefore in effect answering the original and amended bill, and the court cannot for the same reason take off the file the amended bill, and leave the supplemental bill remaining. Besides, this is not the proper time to ask for costs, but upon the hearing, which is about to take place.

THE LORD CHANCELLOR:—I have no difficulty in saying that the defendant is entitled to all the costs sustained by him beyond what he had been put to if the bill had been originally a bill for a foreclosure, such as the costs of the issue at law, and of this application. I think that the defendants might have dismissed the first bill with costs. I cannot, however, go the length of the motion in ordering the amended bill to be taken off the file, as it is set down for hearing.

Order made.

(a) 1 Dick. 110.

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 1815.—*Lambert v. Parker.*


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\**LAMBERT v. PARKER.*

ROLLS.—1815: 16th February.

Maintenance ordered, upon the fair inference of intention, where legacy is given to children "when" and "as" they attain twenty-one, with survivorship in case of any dying under that age, and if all die the legacy to cease.

RICHARD SWALLOW, the plaintiff's grandfather, by his will, dated 17th February, 1801, gave to the plaintiff's late mother, his daughter, during the term of her natural life only, an annuity or yearly sum of 200*l.* for and towards the maintenance of herself and the education and maintenance of her children, and to be applied by her for that purpose in such proportions, manner and form as she should from time to time think proper, uncontrollable of her then present or any future husband, which annuity he directed to be paid to her or her assigns, by four quarterly payments in the year; the first of such payments to take place and be made within three calendar months next after his decease; and did further thereby direct that the receipts of his said daughter, the plaintiff, should from time to time be sufficient discharges for the said annuity or any part thereof, notwithstanding her then present or any future coverture, it being his desire that the said annuity so thereby bequeathed for the benefit of his said daughter and her children, might not be subject to the debts, control, or engagements of her then present or any future husband, and that upon and after the decease of his said daughter, the testator thereby gave the sum of 5,000*l.* to all and every the children of her body lawfully begotten, *when and as* they should respectively attain the age of twenty-one years, to be equally divided between or amongst them, share and share alike; but in case one or more of such children of his said daughter should happen to die before the attainment of his, her, or their respective ages of twenty-one years, he directed that the share or shares of him, her, or them so dying as aforesaid, [\*144] should go and be paid to the survivors \*of them, share and share alike, and as such survivors should attain

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 1815.—*Lambert v. Parker.*


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their respective ages of twenty-one years, and if only one such child should live to attain the age of twenty-one years, in that case he directed the whole of the said sum of 5,000*l.* should be paid to such one child, his or her executors or administrators; but in case no such children of his said daughter should happen to survive her, or having survived her, in case no such child or children should attain the age of twenty-one years, then he directed the said legacy or sum of 5,000*l.* should *cease*, and sink into his personal estate.

The plaintiffs being the infant children of the testator's daughter, now presented their petition for maintenance.

Sir *Samuel Romilly* and Mr. *Garratt* in support of the petition:—The legacy in this case is vested, and the payment of it only postponed; the words “when” and “as” refer only to the time of payment. It appears that the testator at all events intended that the infants should have maintenance, by giving the 200*l.* expressly for the maintenance of the infants and their mother. The cases of *Nicholls v. Osborn*,<sup>(a)</sup> *Chaworth v. Hooper*,<sup>(b)</sup> *Taylor v. Johnson*,<sup>(c)</sup> *Beckford v. Tobin*,<sup>(d)</sup> and *Acherley v. Vernon*<sup>(e)</sup> were referred to.

Mr. *Parker* opposed the petition:—Nothing was given to the children till they attained twenty-one, with survivorship in case of their dying \*under that age; but they were [\*145] to have the legacy *when* and *as* they respectively attained that age. The case of *Descrampes v. Tomkins*, stated in a note to *Shawe v. Cunliffe*,<sup>(g)</sup> seems a decision of the Lord Chancellor, in point, to show that in such a case interest cannot be given for maintenance.

Sir *Samuel Romilly* in reply:—Independently of what has been before urged, there are other words in this will which sup-

(a) 2 P. W. 419.

(b) 1 Bro. C. C. 82.

(c) 2 P. W. 504.

(d) 1 Ves. 308.

(e) 1 P. W. 783.

(g) 4 Bro. Ch. Cas. 149.

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 1815.—Attorney-General v. Lord Dudley.
 

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port the claim of maintenance; the testator has said, that in case no child should attain twenty-one, then the legacy should *cease*: now unless the legacy had some effect before that event, there was nothing to cease, it not having existed to any effect whatsoever.

THE MASTER OF THE ROLLS:—The strong argument in support of maintenance is that the testator has expressly given it during the mother's life; and it is extremely improbable, therefore, that he intended the children should be without any provision, in case she died leaving them under age. I think, therefore, there is a fair inference from the whole of this will, that the testator's intention was to give maintenance. The words "when" and "as" do not suspend the gift; but only the time of payment. There is too, certainly, something in the argument founded upon the word "*cease*" used in the will.

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[\*146] \*ATTORNEY-GENERAL v. LORD DUDLEY.

ROLLS.—1815: 18th February.

Purchase of trust property by trustees for their own benefit, set aside after a considerable lapse of time and several assignments.

Dissenters may sue by information in the attorney-general's name, for charity estates belonging to them.

THIS was an information and bill filed in 1809, praying that the defendants might be declared trustees of a leasehold estate, as having purchased under trustees, who had themselves bought the property in question in 1787, subject to the payment of 800*l.*, and interest advanced by such trustees in 1787, for the same.

James Hughes, in 1782, by deed enrolled, assigned to Bunn and Sanders, and several other persons, the premises in question for five hundred years, upon trust for the society of Anabaptists, or particular Baptists in Dudley. In 1787, the society having contracted debts to the amount of 800*l.*, put up the premises to

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 1815.—Attorney-General v. Lord Dudley.
 

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sale, when Bunn and Sanders became the purchasers at the price of 300*l*. In 1791, Bunn and Sanders assigned to Hancox, upon trust by sale, to pay himself and another creditor, the sum of 300*l*. each with interest. In 1795, Hancox sold the premises for 911*l*., except some small parcels which he sold to several other persons. In 1803, Lord Dudley became a purchaser for about 5,000*l*. Notice was charged and proved as against the defendants, of having purchased with the knowledge that Bunn and Sanders were trustees, who had purchased the trust property.

Sir *Samuel Romilly*, Mr. *Hart* and Mr. *Wetherell*, for the plaintiff, relied upon the doctrine of the court that a purchase by a trustee of trust property could not stand.

\*Mr. *Fonblanque*, Mr. *Leach*, Mr. *Hall* and Mr. *Heald* [\*147] for the defendants:—1. There is no rule to show that in all cases a trustee to sell shall not be himself a purchaser; but only that he shall not thereby gain a profit to himself, *Whitchcote v. Lawrence*.(a) In the present case the value at the time, was given for the premises. It is also too late after the great length of time which has elapsed, to set aside the sale, *Campbell v. Walker*.(b) As to the casual increase of value which has since taken place, that is no ground whatsoever for relief. Only constructive notice is proved in this case which can never be equal to a direct breach of trust. 2. These dissenters have no title to sue by information in the name of the attorney-general. Duke's Char. Uses, 125. *Attorney-General v. Hewer*.(c) As a bill, it is defective for the want of the necessary parties interested, it appearing by the answer that there were other purchasers from these trustees besides the defendants, and who are not before the court.

Sir *Samuel Romilly* in reply:—Land or money given to maintain a preaching minister is within the equity of the Statute of Charitable Uses.(d) There have been many other decisions to the

(a) 3 Ves. 740.

(c) 2 Vern. 387.

(b) 5 Ves. 678.

(d) Stat. 43 Eliz. c. 4.

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 1815.—Calley v. Short.
 

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same effect.(a) As to the want of parties from the other purchasers not being before the court, no notice being alleged against them, they are out of the question.

THE MASTER OF THE ROLLS:—There have been [\*148] several late cases in which \*Protestant dissenters have been permitted to sue by information by the attorney-general, where the gift or devise is clear of the Statute of Mortmain.(b) I think the proper answer is given to the objection for want of parties. Lord Rosslyn's rule mentioned in *Whichcote v. Lawrence* has certainly been since corrected by the present Lord Chancellor, who in one case(c) particularly says, that *Fox v. Mackreth* either ought to have been decided in favor of Mackreth, or this court originally, and the House of Lords finally, were right in refusing an issue to try whether the estate was worth the price Mackreth gave, or was of a greater value at that time. The length of time in this case ought to weigh, and therefore the decree must be without costs.

(a) 1 Eq. Cas. Ab. pl. 3.

(b) See *Attorney-General v. Fowler*, 15 Ves. 85.

(c) *Ex parte Lacey*, 6 Ves. 128.

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#### CALLEY v. SHORT.

ROLLS.—1815: 18th February.

Payment of money into a banking-house to be placed to the credit of another, upon a condition; the money in the meantime to stand in the banker's books in the name of the party paying it in: it is at his risk, and the loss is his, if the bankers fail before the condition is complied with, though the other party had written to desire it to be paid in generally.

In 1808, Lush executed a mortgage for 2,000*l.* to Bowles & Co. In 1809, Lush sold his equity of redemption to the defendant Score, who being desirous of paying off the mortgage to Bowles & Co., applied to the plaintiff to advance the 2,000*l.* and take an assignment of the mortgage, which he consented to



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1815.—*Calley v. Short*

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do. An assignment of the mortgage was accordingly prepared, all objections to the title having been removed. The \*title deeds had been sent up by Bowles & Co., from [\*149] the country to Brickwood & Co., bankers, in London; but were afterwards sent back again. The objections to the title being afterwards removed, Ward, the plaintiff's agent, went to the banking-house of Brickwood & Co., to pay the money, and take the deeds; but found that they had been sent back again into the country to Bowles & Co. Score being in want of the money, his solicitor applied to Ward to pay it into Brickwood & Co.'s house, in his own name, taking their special receipt for the same, concluding that Bowles & Co. would send up the deeds when they found that the money was actually in their agent's hands, particularly as their solicitor, Charles Bowles, had proposed to Score that mode of payment by the following letter to him: "Shaftesbury, 28th June. Dear Sir: Lush's mortgage. Messrs. Bowles & Co. will not allow Mr. Bowles to send these deeds to London till they are apprised of the principal and interest being paid into their house in town. If the money is ready, perhaps Mr. Ward would not object to sending the bankers a draft, at a few days' date, upon receipt of which they would immediately send the deeds to him, or as he may direct; or if he does not approve of this mode, he can pay the amount into Brickwood's house, and take an accountable receipt. I am, &c., P. M. CHITTY;" he being the clerk to Mr. Bowles. Price having prevailed on Ward to make the payment in the manner proposed by him, on the 5th July following, gave Ward the form of a receipt under which he conceived the money might be safely paid in as follows: "Received of Mr. Ward two thousand pounds, to be placed to the credit of Messrs. Bowles & Co., provided they deliver to said Mr. Ward the title deeds of Mr. Score, which now are or lately were in their possession, on or before the \*15th instant, otherwise the said 2,000*l.* to be in our [\*150] hands on account of said Mr. Ward." Ward approving of the receipt, on the said 5th July, went to the banking-house of Brickwood & Co., and paid in the 2,000*l.*; but Ward, conceiving that if the 2,000*l.* were placed to the credit of Bowles &

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1815.—Calley v. Short.

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Co., he should have some difficulty in receiving it back again from Brickwood & Co., he suggested at the banking-house that the money had better be placed in his (Ward's) name, which being assented to, the entry of the said sum was accordingly made in the name of said Thomas Ward, who also took a receipt as follows: "Received the 5th July, 1810, of Mr. Ward, 2,000*l.* to be placed to the credit of Messrs. Bowles, provided they deliver to the said Mr. Ward the title deeds of Mr. Score, on or before the 15th instant, otherwise 2,000*l.* to remain in their hands on account of said Mr. Ward. J. and J. Brickwood, J. Ranier & Co." On the following day Brickwood & Co. stopped payment, and on the 7th July, a joint commission of bankrupt was issued against them, and assignees were chosen. On the day the money was paid in, Brickwood & Co. wrote to inform Bowles & Co. of it, that it had been paid into their account, who sent off the said Charles Bowles with the deeds to carry them to London, but he stopping at Salisbury, was there informed of the failure of Brickwood & Co., and proceeded no farther. On the 10th July, Bowles & Co. became bankrupts, and their assignees got possession of the deeds

The bill prayed, that the plaintiff might be declared to have rightly paid the said sum into the bank of Brickwood & Co. according to the authority and directions of Bowles & Co. and the defendant Score, and that the said sum might be [\*151] decreed to be carried to the account \*of Bowles & Co.

in the books of Brickwood & Co., as the same stood at the time of their bankruptcy; and that the plaintiffs might have the benefit of the mortgage, and that the assignment and title deeds might be delivered up to the plaintiffs; or if the court should be of opinion, that under the circumstances, they were not entitled to an assignment of the mortgage, and the delivery up of the title deeds by the defendant, the assignees of Bowles & Co., then that the defendant Score might be decreed to redeem the mortgage to Bowles & Co., and to make a valid mortgage of the premises to the plaintiff, and deliver up the title deeds to them, or that he might be decreed to pay the said sum with in-

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1815.—*Calley v. Short*

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terest thereon, from the 5th July, 1810, when the same was advanced.

The case was argued by Mr. *Fonblanque*, Mr. *Cook* and Mr. *Heald* for the plaintiff; by Mr. *Bell* for the defendant *Score*; by Mr. *Leach* and Mr. *Trower* for the assignees of *Bowles & Co.*; and by Sir *Samuel Romilly* and Mr. *Tinney* for the assignees of *Brickwood & Co.*

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THE MASTER OF THE ROLLS:—This case must be decided without any reference to the state of the account as between *Bowles & Co.* and *Brickwood & Co.* The proposal of *Bowles & Co.* was, that if the money was paid into their account, or if a short check was given for it, it should be as if it was paid to themselves, and that the mortgage deeds should be delivered up upon the money being so paid. But Mr. Ward does not comply with this proposal. In effect he said this: "I will not part with the money absolutely, nor will I give a short check for the money; but I will only pay it in conditionally." He does so pay it in to the banking-house of *Brickwood & Co.*

\*providing and taking care that even the entry of the [\*152] money in the bankers' books should be in the name of him, the said Thomas Ward. This being so done, the money in contemplation of law, therefore, remained the money of Ward, until the contingency happened upon which it was to belong to *Bowles & Co.* No act was afterwards done by which *Bowles & Co.* adopted such mode of payment. They never engaged or consented that the money should be remaining at *their* risk, and that they would deliver up the deeds whether the money was forthcoming or not. They did nothing to transfer the risk from Ward to themselves. The loss, therefore, is the loss of Ward, and not of *Bowles & Co.*

The case as between the plaintiff and *Score* stands precisely on the same footing as between the plaintiff and *Bowles & Co.* If the payment into the banking-house of *Brickwood & Co.* was

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 1815.—Lloyd v. Passingham.
 

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not a payment to Bowles & Co. then it was not a payment by the plaintiff to Score. The consequence, therefore, is, that the bill must be dismissed.

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### LLOYD v. PASSINGHAM.

1815: 21st February.

Bill to set aside a compromise, upon the discovery of a forgery, unknown to the plaintiffs at the time of the compromise being entered into, dismissed, under the circumstances. The Fleet book of marriages, not evidence as a register. See 16 Ves. 59, S. C.

IN 1746 Gwin Lloyd married Sarah Hill, sister of Sir Rowland Hill, Bart., and in the affidavit by which the license was obtained for the solemnization of such marriage, the said Gwin Lloyd is described to be a bachelor. By deed, dated the 12th March, 1746, made prior to the said marriage, the said [\*158] Gwin Lloyd \*conveyed his estate in settlement upon the said marriage, and the issue of it. There was no issue of the marriage, and Gwin Lloyd dying in 1774, Catharine Lloyd and Mary Lloyd, his sisters and co-heiresses at law, entered into possession of his estates. In 1794 an ejectment was brought by the defendants to recover the said estates as the grandsons of the said Gwin Lloyd, by a first marriage between him and Elizabeth Taylor, in 1740. On the trial of the said ejectment in 1794, a book, kept for the purpose of registering marriages in the Fleet prison, was produced as evidence of the said marriage, and which contained the following entry: "No. 658. 1740, November 24th, Gwin Lloyd, of Hendwer Co., of Merioneth, Esq., and Elizabeth Taylor, of St. James', Westminster. B. and S. Pr. Wm. Wyatt." A register of baptisms in the parish of St. Pancras, for the year 1741, was also produced containing the following entry: "Elizabeth, daughter of Gwin and Elizabeth Lloyd, September 27, 1741." The defendants claimed as the issue of the said daughter Elizabeth, mentioned in the said register of

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1815.—Lloyd v. Passingham.

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baptism, and who intermarried with Robert Passingham, deceased. Upon the said evidence of the legitimacy of the said Jonathan and Robert Passingham, the jury upon the said trial found a verdict for them. By articles of agreement of the 20th August, 1794, a compromise was entered into between the said parties.

The bill was filed, stating, that since the said compromise had been entered into, the plaintiffs had discovered the said entries in the book of Fleet marriages and in the register of baptisms, were forged by the defendants or one of them, and prayed that the said compromise might be set aside.

It was proved on the part of the plaintiff, that Robert \*Passingham, who had been clerk to an attorney, went [\*154] with William Kendray, in July or August, 1794, to St. Pancras Church; that while the said Robert Passingham remained in a field opposite the church, Kendray examined the register book, and took a sheet of paper and wrote out the names of the baptisms contained upon a particular page, adding thereto a name upon the fresh paper, afterwards rubbing out the former names with a pumice-stone and India-rubber, and entering the fresh leaf with the additional name in the book. There was also evidence of a subsequent confession of the forgery by Robert Passingham.

The defendant, Robert Passingham, demurred to the discovery sought by the bill which went to criminate him. The defendant Jonathan Passingham, by answer denied all knowledge or belief of any forgery; asserted the said marriage between Gwyn Lloyd and Elizabeth Taylor, and that Elizabeth, the daughter, was brought up by Gwyn Lloyd; but that in 1762, in consequence of her marriage with Robert Passingham, her father took offence and discarded her. He farther stated, that he and his brother were both well known to Catherine Lloyd and Mary Lloyd, who contributed to their maintenance and education, and purchased commissions for them in the army. That in August, 1783, the

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 1815.—Lloyd v. Passingham.
 

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defendant, on his return with his regiment from America, was on a visit to his aunt Catherine Lloyd, who then repeatedly told him that she had a great secret to disclose to him, and, that she might not be overheard, took him to an alcove in her garden for the purpose of revealing to him; but that after talking of her brother, the said Gwyn Lloyd, she burst into tears, and said, "I cannot tell you now." The defendant farther stated, that he had been informed and believed that Gwyn Lloyd, in his [\*155] last illness, repented of his conduct towards \*his said daughter, and sent for his sister Catherine Lloyd, who delaying to come to the said Gwyn Lloyd, found him, when she arrived, upon the point of death, and only able to say to her, "you have come too late, but you know all, and do justice."

There was some evidence on the part of the defendants of reputation of the marriage, and of declarations of Gwin Lloyd in support of his marriage with Elizabeth Taylor.

The LORD CHANCELLOR gave his judgment on the above day, the cause having been argued some time before. He expressed his opinion to be, that the book of Fleet marriages could not be read as a register, not having been compiled under public authority, and therefore was not legal evidence; and that Lord Kenyon's opinion to the same effect was well known. The evidence of reputation of marriage, however, ought not to be weakened by the circumstances of the book not being evidence, and he thought the case might have been left to the jury upon that evidence. In this case there was no imputation of fraud or improper conduct, which could fairly be charged upon the defendant Jonathan Passingham, the elder brother. It is true, that in *Hugenin v. Baseley*,(a) his lordship had declared his opinion, that interests obtained through the frauds of a third person could not be maintained. But it would be carrying the principle too far to extend it to Jonathan Passingham who had innocently acquired his interests, and had afterwards sold them to innocent purchasers.

(a) 14 Ves. 273.

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1815.—Gower v. Eyre.

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As to directing an issue at law, it was difficult to know what sort of issue could be framed to suit the case, and at all events he thought it could only \*be upon certain terms. [\*156] No terms were, however, offered by the plaintiffs. Valuable demands were certainly given up on the part of the defendants by the compromise, as releasing the by-gone rents and profits, &c. He was of opinion, under all the circumstances of the case, that it was too hazardous to disturb the compromise, and that the bill should therefore be dismissed without costs.

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GOWER v. EYRE.

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ROLLS.—1815: 22d and 23d February.

Direction to trustees to cut trees in aid of testator's real and personal estate held not a trust, but a mere power, upon the whole of the will. Tenant for life entitled to timber for repairs cannot sell the same to reimburse herself expenses incurred in repairs.

SIR JAMES EYRE, Knt., late Chief Justice of the Court of Common Pleas, being seised in fee by indentures of marriage settlement of the 13th and 14th April, 1791, conveyed to trustees to the use of himself for life, without impeachment of waste, remainder to the use of Dame Mary Eyre, his intended wife, if she should happen to survive him and her assigns for her life, and immediately after the decease of the survivor of them, to the use and behoof of the said Sir James Eyre, his heirs and assigns for ever. There was no issue of the marriage.

Sir James Eyre, by his will dated the 20th February, 1789, duly attested, devised all and singular his real and personal estates to trustees, their heirs, executors, administrators and assigns, upon trust, in the first place to pay his debts, and in the next place to convert such parts of his said personal estate as the trustees of his will should not in their judgment require \*to remain in specie into money, and to invest [\*157] such money in government or other securities, and to

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1815.—Gower v. Eyre.

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permit his said wife to receive to her own use the clear rents and profits, and produce of the said real and personal estates, during her life, and after her decease to permit Thomas Eyre to receive the same during his life, and after his decease to permit his two sisters, Frances Edgill and Maria Eyre, jointly, and the survivor of them, to receive the same during their lives, and the life of the survivor of them, and after the decease of the survivor of them, in trust for the said Thomas Eyre, his heirs, and assigns for ever; and he thereby directed that the said trustees *should have power* to cut down and sell such of the timber trees growing upon his estate as should be ripe for cutting, in aid of the fund of his real and personal estate; and it having been, as the said testator declared by his will, one of his objects to increase the stock of timber on his estates, and to nurse up great numbers of young plants, which might from time to time require thinning, or to have trees not yet arrived at their full growth taken down, in order to give the young plants air and room to grow, he desired that his said trustees would employ a proper person to look over the timber occasionally, and to see that the young plants were properly thinned, and had air and room to grow.

Sir *James Eyre* having died on the 6th July, 1799, the defendant, his widow, elected to abide by his will.

By indentures of the 7th and 8th August, 1807, the reversion of the premises in question was conveyed to the plaintiff in fee, subject to the life estate of the defendant, Dame *Mary Eyre*, the widow.

[\*158]     \*The bill was filed, charging that the defendant had cut down a great number of timber trees, and sold the same for a considerable sum of money, and the bill prayed that an account might be taken of the value of the same, and for an injunction from cutting more timber.

The defendant, by her answer, stated that between the death of the testator and the conveyance to the plaintiff, she, from



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1815.—Gower v. Eyre.

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time to time, expended very considerable sums of money in necessary repairs on the premises, and that the mansion-house, from age and the original construction of the same, required and still requires continual and expensive repairs, and that she expended such sums of money as aforesaid, in full faith and confidence that the trustees would have felled timber, according to the condition in the testator's will, sufficient to defray the expense of such repairs, and would have reimbursed her out of the produce thereof, to the full amount of the payments so made by her as aforesaid; and that the defendant previously to the said 8th of August, 1807, frequently through her agent applied to the said trustees, and requested them to give the necessary directions for the fall of such timber, and to apply the produce thereof towards payment of the sums so advanced by her as aforesaid; but the said trustees wholly neglected to take any steps therein, and under the circumstances aforesaid, she was advised, and she submitted that she was justly and truly entitled, under and by virtue of the said will of Sir James Eyre, as stated in the bill, to cut down or fell such a quantity of timber as should be sufficient to defray the expenses so incurred in repairs as aforesaid, and she accordingly, for the purpose of answering the annual expenses which have been incurred in the necessary repairs of the said mansion-house, and other \*buildings, had caused to be cut down and felled in [\*159] each year, from the year 1808, such a number of timber trees as by the produce thereof were sufficient to pay off and discharge all and every the sums and sum of money as were or was at the end of each year respectively due and owing to such persons as had been employed by her in such repairs as aforesaid.

The cause was heard upon bill and answer.

Sir *Samuel Romilly* and Mr. *Horne* for the plaintiff, contended, that the widow had no right to act as she had done, and particularly was not authorized to cut timber, and sell the same for the

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1815.—Gower v. Byre.

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purpose of reimbursing herself any expenses she had been put to in repairs.

Mr. *Leach* and Mr. *Wingfield* for the defendant, argued: 1st. That under the words of the testator's will the widow was entitled to cut timber fit for cutting, and that the produce thereof was by the express terms of the will in aid of the fund of his real and personal estate, in the hands of his trustees for the general purposes of his will, and that if the defendant was answerable to anybody for the produce of the timber cut and sold, it was to such trustees, and not to the plaintiff: 2d. That the defendant having expended money in repairs was entitled, under the circumstances, to repay herself out of the moneys which the timber had sold for.

Sir *Samuel Romilly* in reply:—The words of the will give the trustees power to cut, but do not direct them to do so. It is not imperative upon them. As to the fund which the produce is directed to be in aid of, the terms of the will are, being [\*160] \*"in aid of his *real* and personal estate;" how can it be said that the timber, or the produce of it, belongs more to the personal than to the real estate, which the plaintiff has purchased? The defendant's claim goes in effect to the whole of the timber on the estate; whereas it is the declared object of the testator to increase the stock of timber on his estate. Although the defendant might have been entitled to timber for necessary repairs, that does not give her a right to sell timber.

THE MASTER OF THE ROLLS:—The real question in this case is, whether it was a trust or a power given to the trustees by the testator's will? If it was a trust, all the timber upon the estate ripe for cutting must be felled. If it was only a power, then the trustees were to exercise a discretion as to what timber they should cut.

Now it seems to have been the testator's intention that his estate should become a well timbered estate. I think that con-

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 1815.—Reeks v. Postlethwaite.
 

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sistently with this declared object of his, it would be difficult to convert the words of this will into a trust.

Mr. *Leach* requested that the case might stand over in order to see whether he could not find some authority in his favor upon the other point.

The following day he mentioned to the court that he had not been able to find any such authority.

THE MASTER OF THE ROLLS :—Upon the other point, it is laid down in the books, and particularly by my Lord Coke, (a) that a tenant \*cannot cut down trees for repairs [\*161] and sell the same; he must use the timber itself in repairs, the sale being waste. *Lee v. Alston* (b) was also a case of this sort in equity, in which the tenant for life, punishable for waste, with power under an enclosing act to mortgage for the expense of the enclosure, felled timber and applied the produce instead; but was decreed to account to the owner of the first estate of inheritance.

Decree according to the prayer of the bill.

(a) Co. Lit. 53, b.

(b) 3 Bro. C. C. 37; 1 Ves. jun. 78.

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#### REEKS v. POSTLETHWAITE.

Before the Vice-Chancellor.—1815: 22d February.

Bill for the redemption of a mortgage after twenty years, upon the evidence of a conversation proved by one witness only, dismissed. His Honor, however, of opinion that parol evidence was admissible in such cases.

JOHN REEKS, the father of the plaintiff, in 1768 made a conditional surrender of the copyhold estate in question to William Adams, to secure the sum of 80*l.* with interest. William Adams died in 1766, without having disposed of the same by his will,

1815.—Reeks v. Postlethwaite.

and having appointed Martha Adams, his eldest daughter, and the defendant's wife, his executrix and residuary legatee. In the month of December, 1767, Nanny Adams, the youngest daughter of the said William Adams, and who was heir according to the custom of the manor of which the premises were held, was admitted subject to the mortgage. Nanny Adams afterwards departed this life without issue, leaving her sister Martha Adams, the wife of the defendant, her customary heir. In May, 1777, Martha and the defendant her husband were admitted to the said copyhold premises, subject to redemption. John Reeks, the mortgagor, died in 1767, leaving Martha Reeks, his [\*162] widow, and the plaintiff, \*then an infant, his only son and customary heir. John Reeks was, at the time of his death, in possession, and Martha Reeks, his widow, continued in such possession until the year 1769, when the defendant Postlethwaite brought an ejectment against her, and recovered possession of the said copyhold premises. In 1773, the plaintiff attained his age of twenty-one years.

The bill charged, and it was proved by the evidence of a single witness only, of the name of Thomas Edgcombe, that in the month of August, 1810, he was employed by the plaintiff as his solicitor to make application to the defendant Postlethwaite, respecting the redemption of a copyhold estate, which had been mortgaged by the plaintiff's late father, to the late father of the defendant's wife, and thereupon he did accordingly, on the 28th August, go to the place where the defendant resided, and told the defendant that he was directed by the plaintiff to make application to him respecting the estate which had been mortgaged by the plaintiff's father to the father of the defendant's wife; and the witness requested that the defendant would make out an account touching the said estate as between mortgagor and mortgagee, in answer to which the defendant said, that his papers were at Mr. Johnston's, at Chichester, and that as he was then busy, it being harvest time, he would in about a month meet the deponent at Chichester, and would previously write to him to fix the day, and that he wanted nothing but what was fair; and

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1815.—*Reeks v. Postlethwaite*.

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that defendant further said that Reeks, meaning the plaintiff, had better in the meantime call a court to take up the said estate, upon which the witness conceiving that there would be a considerable balance due to the plaintiff, said to the defendant, that it would be better to settle the accounts first.

\*The bill which was filed in June, 1812, prayed that [\*163] the plaintiffs might be at liberty to redeem the said premises, and that the usual accounts might be taken.

The defendants, by their answer, denied that when Edgecombe came to them, the defendant Postlethwaite promised to make out the accounts, or that he did make out any such accounts, and stated, that by the papers which he then said were with Mr. Johnston, he meant a surrender, bond, promissory notes, and an agreement entered into with a person of the name of Cawley, and that all he, the defendant, meant or intended by proposing or promising a meeting with the plaintiff's solicitor was, that after the defendant had an opportunity of inspecting the said papers, he would explain to the plaintiff's solicitor what had formerly passed or been done relative to the said copyhold estate; and the defendant further stated, that when in the course of the said conversation the plaintiff's solicitor affected to treat the said copyhold estate and premises as the property of his client, he, the defendant, being fully satisfied and convinced that the same were no longer redeemable, but were the defendant's own absolute property, observed to the said solicitor that the defendant wanted nothing but what was fair and just, and said, or advised, that if the said premises were the plaintiff's property, he had better in the meantime call a court, and take the land, the defendant in the meantime being well aware that the plaintiff could not call a court, or take up the land, having no right or title whatever to be admitted to the same; and the defendant thereby intending to reply ironically to the assertions of the plaintiff's solicitor, and by no means intending to convey the idea that the said estate and premises were, in the defendant's judgment, the property of the plaintiff.

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 1815.—*Peaks v. Postlethwaite*.
 

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[\*164] \*The VICE CHANCELLOR gave his judgment on the 22d February, 1815. This is a bill to redeem, filed forty-nine years after the date of the mortgage, forty-three years from the time of possession taken by the mortgagee, and thirty-nine years from the time of the plaintiff's coming of age. The length of time, therefore, which has elapsed, is abundantly sufficient to defeat the claim, unless a conversation which took place can be depended upon. The question in this case is, whether parol evidence of conversation had with the mortgagee in possession shall be sufficient to set up a right to redeem, which is otherwise gone? There is but one case in which such evidence has been admitted for that purpose, which was the case of *Perry v. Marston*,<sup>(a)</sup> and in which it was admitted certainly, under peculiar circumstances, the conversation there taking place after the bill and answer filed; but Lord Kenyon, then Master of the Rolls, notwithstanding, thought it had such weight, that he must decree a redemption upon it. It is true that decree was reversed upon appeal to the Lord Chancellor; but that reversal did not affect this point, for it went altogether upon the effect of a surrender. There was a subsequent case of *Whiting v. White*,<sup>(b)</sup> before Sir Pepper Arden, which I have been favored with two manuscript notes of, one by Master Alexander and the other by Mr. Owen, by which the Master of the Rolls appears to have questioned the propriety of admitting parol evidence to be received at all in these cases, and he also observed, that Mr. Brown, in his report of that case, had not stated all the evidence. I have taken the trouble to examine the original depositions

in the six clerks' office, in that cause of *Perry v. Marston*, and by which it appears that several witnesses were examined, and from their evidence the defendant had certainly admitted that he had got a regular account of the rents received, and of the money expended by him on the building, and that he was ready to settle at any time.<sup>(c)</sup> Lord

(a) 2 Bro. C. C. 397.

(b) See that case reported, *ante*, p. 1.

(c) I have been favored with the depositions copied, by order of the Vice-Chancellor from the register's book in the above cause of *Perry v. Marston*, and which are as follows:

1815.—Reeks v. Pootishwaite.

Alvanley, in *Whiting v. White*, \*does not cite any au- [\*166]  
thority or case for his opinion against admitting parol

"John Linton, corn factor, on the part of the plaintiff, deposed that in June, 1780, he saw the defendant at the door of Farmer Perry's house; desired to hear what passed. Farmer Perry asked the defendant if he had made out his accounts, which deponent understood to be accounts in the estate in dispute with his brother, to which defendant replied, yes, they are very readily made out, for I have an exact account of everything from the beginning to this time, both as to the rent received and of money expended in building, and told the farmer, that if his brother would appoint a time, and bring an attorney with him, the said accounts should be settled. That Perry thereupon proposed that the defendant should appoint such time for settling the said accounts; but defendant refused so to do, and desired the same might be appointed by the brother, and notice given to him thereof, and that the said defendant would meet his brother accordingly."

Benjamin Homer, another witness, stated "That the defendant John Marston expressed much concern that the proceedings should be carried on against him, and repeatedly declared that he knew the plaintiff Richard Perry was heir at law of the estate, and wished not to expend any money in law, but to put an end to the suit, though he said he believed it to be in his favor, alleging that he had kept a regular account of the receipts of the rents and profits of the mortgaged estates, and of the money disbursed in repairs, for a long course of years, or spoke words to that or the like effect, of which the said defendant made many representations at the door and in the house of the said Farmer Perry, in his and this deponent's hearing."

Mary Homer, widow, another witness, stated "that three years since last spring to the best of her remembrance as to the time, this deponent and the said plaintiff, Richard Perry, being at the house of Farmer Perry, in the liberty of Bilston, the defendant John Marston came there, and entered into a conversation with the plaintiff Richard Perry, and with the said Farmer Perry and his wife, respecting a copyhold estate at Bilston, which this deponent understood to be in mortgage to the said John Marston, and to which the said plaintiff claimed a right or title. That in such conversation the said defendant, John Marston, several times acknowledged and declared, in the presence and hearing of this deponent, that the said copyhold estate was in mortgage to him, and that the said Richard Perry was the owner thereof, and the said John Marston repeatedly asked the said Richard Perry why his father Joseph Perry, did not redeem the mortgaged premises in his lifetime, and why he, the said Richard Perry, did not do it since his decease, or come and make the matter up with him, the said John Marston, without any law, or used words to that or the like effect; to which the said plaintiff, Richard Perry, answered, that his father was too poor to raise money to redeem the estate or he certainly would have done it, and paid off the mortgage, and that he, the said Richard Perry, had not then any other way of recovering the estate than by filing a bill in Chancery against him, the said John Marston, for which he had given orders; or spoke words to that or the like effect."

1815.—~~Rocks~~ v. Pestlethwaite.

[\*167] evidence in these cases. The \*point, however, was again brought into discussion in the case of *Lake v. Thomas*, (a)

Farmer Perry, another witness, stated "that in the year 1780, and in or about the month of March or April in that year, to the best of this deponent's recollection, the defendant, John Marston, came to this deponent's house (he, this deponent then keeping a public house), and there asked this deponent, why this deponent's father did not pay off the mortgage in his lifetime (meaning, as this deponent then understood and believeth, the mortgage which was then on the buildings and premises now in dispute in this suit), to which this deponent replied, that he, this deponent's father, was always poor and unable to pay off the said mortgage; that the said defendant then asked this deponent why this deponent's brother, the plaintiff, did not come and settle the matter, without going to law; that this deponent then asked the said defendant if the plaintiff would settle the matter with him, whether he, the said defendant, would be accountable for the rents received from the said premises and interest for the same, to which the said defendant answered, that he would, for that he had got a regular account of the rents received and of the money expended on the said buildings, and that he was ready to settle at any time. That in the month of May or June in the said year, 1780, the said defendant again called at this deponent's house on horseback, when they had a further conversation about the premises in question, in which the said defendant asked this deponent why his brother, the said plaintiff, would not come and settle the matter without law; that he, the said defendant, was ready to compromise the same on his part; that at the time last before mentioned, the said defendant asked this deponent to ask the plaintiff to appoint a time for him, the plaintiff, and his attorney, to meet him, the defendant, to settle the said matter; that he knew that the plaintiff was heir to the premises, but that the length of years was in favor of him the said defendant, when this deponent asked the said defendant if his accounts were ready, to which the defendant replied, that he had always an account ready by him of the rents of the premises received, and of the money expended thereon; that the said defendant, after a conversation between him and this deponent, to the effect after mentioned, whilst he, the said defendant, sat on horseback as aforesaid, alighted from his horse, and came into this deponent's house, and stayed there a very considerable time, but nothing passed between the said defendant and this deponent on this subject, after he, the said defendant so alighted from his horse, and came into this deponent's house as aforesaid, save a repetition of what is before mentioned to have passed between them whilst he, the said defendant, sat on horseback at this deponent's house as aforesaid, or of some part thereof."

Hannah Perry, wife of Farmer Perry, another witness, stated "that three years since last spring, to the best of her remembrance, as to the time, the said complainant, Richard Perry, and the defendant, John Marston, were in conversation at her husband's dwelling-house, respecting the copyhold estate and premises in question, and which from such conversation and other information this deponent under-



1815.—Beeks v. Postlethwaite.

and which was argued \*by Master Alexander; but Lord [168] Rosslyn, before whom that case was, said, that with respect to the objection \*that nothing but writing would [169]. do, he would not decide it without further consideration.

In the absence then of authority, let us consider the point upon principle. The right to redeem arises upon the original contract between the parties, being by the very terms and upon the face of the conveyance itself. It is true, that when the time specified is elapsed, that right is gone at law; but not in equity. That gets rid entirely of the objection of the Statute of Frauds, for the contract was in writing and the right of redemption was reserved by that contract. To consider then, next, the rule as to twenty years barring the right of redemption; the first question is, is it an absolute rule? No; it is a qualified rule, and depending altogether upon circumstances. Numberless cases might be cited as to that, first, where there have been disabilities of the party, as infancy, coverture, beyond sea. Now writing is not necessary to prove these disabilities, and it would often be impossible to procure it; parol evidence of them is always received. Next, are disabilities the only cases in which the rule is departed from? No; receiving interest, keeping accounts, treating it in any will or deed as a mortgage, will do. Such acts, and others of the sort then, are also sufficient to take the case out of the rule, and which may be solemn and deliberate acts, or not, according as the party is attending or not attending to what is doing. I admit, that to acknowledge it was originally a mortgage, is nothing at all; that is *ex concessis*; and conversation, therefore, admitting that fact, cannot carry it farther than the original deed between the parties carries it. There must be \*evidence [170] that it is a subsisting mortgage. Now with respect to

stood was in mortgage to the said John Marston, and to which the said plaintiff, Richard Perry, set up some right or title; and the said defendant, John Marston, did then, in the presence and hearing of this deponent, and of Mary Homer, this deponent's mother, ask the said plaintiff, Richard Perry, why his father did not pay off the mortgage on the said estate and premises in his lifetime; but this deponent being busily employed in drawing and delivering out ale, did not hear what answer the said Richard Perry gave to such questions."

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 1815.—Reeks v. Postlethwaite.
 

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every one of the acts, in all the cases in which a redemption has been decreed after twenty years, I would ask how they are to be proved? By the law of evidence, must be the answer. By writing only? I ask, where is the law which says that? What precise act, then, will be sufficient? The answer must be, any precise act. So with respect to the Statute of Limitations, I may show after twenty years an actual entry by me, or an acknowledgment from the party of his being my tenant. So with a mortgagee, the acts need not be done with the other party; his own acts, the mere *ex parte* acts of the mortgagee will be sufficient. Cases of part performance constitute another class of cases in which parol evidence is received respecting interest in land; so cases of trust. If you tie a party down to written evidence, great injustice would often happen. On the other hand, *Perry v. Marston* is certainly a case showing the danger of setting up parol evidence. But we must take care of the principle. To say there is danger of perjury amounts to little; because there is danger of perjury in all parol evidence, and the objection would therefore go to do it away entirely. An acknowledgment of a debt of a hundred thousand pounds, rights of way, easements, water-courses, and numberless other cases, all of them often of immense value, depend upon this sort of evidence. All the court can do is, to watch and take care of it when competent in its nature. Look to the danger the other way, that is, that if you were to say, that after twenty years there shall be no parol evidence for a redemption. A mortgagee may have amused his mortgagor every day with promises of settling; suppose, even interest to have been paid, but which was only to be proved by parol. How easy would it be in

[\*171] \*such cases and many others which might be put, for the mortgagee to draw on the mortgagor till twenty years were elapsed, and then to hold him at defiance. It seems to me, therefore, to be impossible, reasoning it *a priori*, to say that parol evidence is upon principle inadmissible to found a right to redeem after twenty years, but at the same time it must in every case depend upon the nature of that case: and it seems to me that the facts of the case must in these cases of mortgage, as in

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1815.—*Reeks v. Postlethwaite*.

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all others, be tried by the rules of evidence. I have sifted the case to the bottom, from respect to what was said by Lord Alvanley and Lord Rosslyn upon the subject; but there being no case rejecting parol evidence, I think it must be received.

The next consideration then is, as to the sufficiency of it in this case. A conversation between the attorney of the mortgagor, and the mortgagee and his wife, there being nobody to contradict him, must be looked to with considerable caution. It is true that in this case the witness is not now the solicitor of the plaintiff; that he might also have been less unequivocal in what he says, and indeed the defendant in his answer confirms his evidence, but putting a different construction upon the words used. The conversation happens in the midst of the defendant's harvest, when the witness demands the mortgage account. The answer is material, because it is postponing the discussion of the subject; his afterwards saying that he wanted nothing but what was fair, is admitting nothing at all, but leaving the question as to what was fair perfectly undecided. By his answer he has sworn, that by the mention of papers he meant not papers to make out a mortgage account, but a surrender bond and other writings. He might well mean his mortgage deeds and papers. But how can this be considered as a clear deliberate acknowledgment \*of uniformly treating the estate as a [\*172] mortgage interest? The words do not naturally import it, or necessarily bear it. Then as to the words which follow, that the plaintiff had better in the meantime call a court to take up the estate. This is strange, if it is to be understood as advice to the solicitor from the other party himself. Putting the other sense upon it, that the defendant meant to tell the plaintiff to call a court and get his estate from him, it is impossible to say that in so understanding it, the defendant could be informed of his rights, or know what he was doing, if he said anything of the kind. But he denies that any sense of that sort was meant by him; but that he only spoke ironically to the witness, who treated the plaintiff's right as so clear. I believe it in the sense sworn by the answer, and to have been mere taunting and

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irony; and this answer is opposed by the evidence of one witness only. To decree a redemption, when an ignorant man has been taken advantage of, without a single witness to explain or contradict a conversation set up, would lead to excessive danger. In *Perry v. Marston* there were several witnesses examined, and their evidence proved a clear and unequivocal acknowledgment that the mortgagee had accounts ready. This is quite different, and there is nothing in the case like an acknowledgment of treating it as a mortgage within twenty years. I think, therefore, that the evidence opposed to the answer, and after the length of time which has elapsed, is not sufficient; and that the bill must consequently be dismissed, but without costs.

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*February 24th.*—His Honor afterwards, this day again mentioned the case, to observe that he had omitted, in giving his \*judgment, to state that the analogy to the Statute of Limitations did not hold strictly, inasmuch as the moral obligation remained the same, although six years had elapsed without payment of a debt.

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#### GRANT v. MUNT.

ROLLS.—1815: 23d February.

Compensation for the dry rot in house and premises decreed, upon representation of the vendor to the purchaser as to the state of repairs; he relying upon such representations, and stating to the plaintiff that he did not employ a surveyor for that reason.

THE bill stated that the plaintiff being seised in fee simple of a mansion-house and premises, entered into an agreement with the defendant to sell the same to him at the price of 7,350*l*. An agreement in writing of the 25th June, 1812, was accordingly drawn up and signed by the plaintiff and defendant. The bill prayed a specific performance of the agreement.

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The defendant by his answer admitted the agreement; but stated that previous to and at the time he signed the same, he had been induced so to do from the statements and representations by Mrs. Grant, the plaintiff's wife, with whom the defendant had principally negotiated respecting the said house and premises, and from several letters which were written from the plaintiff and his wife to the defendant on the subject, that the same were in such a state as to require no repairs whatever, and at the time of the defendant's signing the agreement, the said Mrs. Grant was present, and declared that "all that would be required to be laid out in repairs of the said house and premises was about 5*l*. for mending a cellar door." Shortly after the defendant took possession, finding that the roof required considerable repairs, and that a floor gave way making an opening to a cellar below, he employed Mr. Soane, a surveyor, to look over the house, who upon a \*careful and minute [\*174] inspection and survey thereof, declared that the said house and the appurtenant buildings were affected with the dry rot, and in such a state of decay as would require a very considerable sum of money to be laid out upon it in necessary repairs. The defendant claimed an adequate compensation out of the consideration money agreed to be paid for the necessary and requisite repairs.

By the evidence of Dwyer, the plaintiff's gardener, it was stated, that on the 4th or 5th June, 1812, the defendant came to view and examine the premises, that the plaintiff's wife was present, and that the defendant looking at the walls and ceiling of the kitchen said, that the same wanted a little repair and whitewashing, that he viewed other parts of the said mansion-house and premises, and that he appeared to be well satisfied with the same. Ranken, the solicitor for the plaintiff, another witness, stated that before the said agreement had been signed, but after the same had been read aloud, Tyndale, the defendant's solicitor, inquired whether the said mansion-house had the dry rot, and whether it was in perfect repair; that the witness objected to such questions, and the plaintiff then said, that with

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regard to repair people were very apt to differ; for his part soon after he bought the house he laid out many hundred pounds in repairing it, and being an old house some repairs might, and probably would be necessary; that with respect to dry rot, he could not tell whether there was dry rot or not, that there was some decayed wood in the vestibule leading to or at the foot of the cellar door, which the plaintiff had pointed out to the defendant; but whether it was dry rot, or what it was, the plaintiff could not tell, and added, that the defendant had seen the premises. The witness then stated, that after some further [\*175] conversation, in which no guarantee was sought for or required by or on the part of the plaintiff or defendant, as to the state of the repair or dry rot, they both signed the agreement.

By the evidence on the part of the defendant, of Tyndale and Malton, it was stated, that at the time of signing the agreement, the defendant told the plaintiff that he relied so much upon him that he had not had the mansion-house and buildings surveyed, and that the plaintiff stated that they were in good repair except as to the cellar door and the parts adjoining the same, which would require the sum of 5*l.* or thereabouts to repair. Crosby, another witness, stated that it would require from five to seven hundred pounds in carpenter's work to repair the said mansion-house. Soane proved that upon going to survey the premises after the agreement, he found the timbers in several parts of the mansion-house rotten, that some wainscoting had been taken down, and also the skirting in the school room, that he thought it would cost between three and four hundred pounds to repair the premises. Smart, another witness, further stated, that in the beginning of the year 1811 he had been consulted by the plaintiff about doing some repairs in consequence of the dry rot being therein, and upon that occasion the plaintiff went with the witness into the cellars, when they examined the timbers there which supported the parlor floor and staircase floor, and which appeared to be much decayed by the dry rot, insomuch that the flooring of the said parlor and staircase was nearly eaten through

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thereby; and after coming out of the cellars a conversation took place between the plaintiff and his wife and the witness, respecting the best means to be used for stopping the progress of the said disorder, and for making good the damage or injury \*the said floors had then already sustained by it, [\*176] and the plaintiff suggested a removal of all the timbers and turning arches with brick and laying stone thereon, in such parts of the said cellaring as were not then arched, with a view to stop the progress of the said disorder, the plaintiff observing that if those parts were relaid with wood the dry rot would again destroy the same, and the plaintiff then inquired of the witness, what would be the expense of a stone pavement for the purpose aforesaid, and he made an estimate of the probable expense thereof, which was between 40 and 50*l*.

Mr. *Leach* and Mr. *Phillimore*, for the plaintiff, argued that before the agreement the defendant was personally shown every part of the house, and was well able to form an opinion for himself; that the evidence did not establish either an industrious concealment of the state of the premises, or any warranty on the part of the plaintiff.

Sir *Samuel Romilly* and Mr. *Wrottesley*, for the defendant, insisted that this was a case of misrepresentation on the part of the plaintiff, amounting to fraud; that he had denied that the dry rot was in the premises, when it was fully proved that he knew of it. *Oldfield v. Round*,<sup>(a)</sup> *Shirley v. Stratton*,<sup>(b)</sup> *Young v. Clarke*<sup>(c)</sup> and *Dyer v. Hargrave*,<sup>(d)</sup> were referred to. The manuscript case cited by Mr. *Sugden* in his book,<sup>(e)</sup> though of dry rot, does not apply; where a purchaser brought an action against a vendor to recover damages for having sold him a house knowing it to have the dry rot, but the vendor not being aware of the defect the \*purchaser was non-suited, [\*177] Lord *Kenyon* saying there was no *mala fides* in the case.

(a) 5 Ves. 509.

(d) 10 Ves. 505.

(b) 1 Bro. C. C. 440.

(e) Sug. Law of Vendors and Purchasers, p. 136.

(c) Pra. Ch. 538.

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Mr. *Leach* in reply:—It is impossible to say that it was the intention of the plaintiff to enter into a warranty. Nothing appears in the case but mere matter of opinion as to what repairs were necessary.

The MASTER OF THE ROLLS thought it was impossible to say that it was mere matter of opinion as to repairs in this case. As to warranty, if the defect was patent or obvious, the warranty would not bind. I do not, however, collect from Soane's evidence that the state of the premises was perfectly visible to everybody. Tyndale's evidence is very material, from which it appears that the defendant stated to the plaintiff, before he signed the agreement, that he relied so much on the plaintiff that he had not had the premises surveyed. Down to the time of signing the agreement it does not appear that the defendant had received any representation from the plaintiff as to the state of the premises. But taking Tyndale's evidence to be true, it was then made, and the plaintiff is bound to make good what he then represented, as to the state of the premises. It is impossible therefore to say, that the weight of evidence in this case (and something too must be allowed for the defendant's answer), is not against the plaintiff. I think, therefore, he is bound to make compensation for his representations to the defendant, unless he will take an issue at law as to the fact of those representations.

The plaintiff declining an issue, it was referred to the Master to see whether he could make a good title to the premises, and if he could, then to inquire what compensation the defendant was entitled to.

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[\*178]

\*BLAKE v. LUXTON.

Before the Vice-Chancellor.—1815: 10th, 11th and 24th February.

*Quasi* tenant in tail of a freehold lease for lives may, by surrendering the old lease, without the trustee's joining, and taking a new lease to himself, bar the remainders



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over; notwithstanding there were prior existing trusts at the time of such surrender. S. C., 3 P. Wms., p. 10, in note. 6 T. Rep. 290.

ROBERT BLAKE, the father of the plaintiff, being seised of a freehold lease for lives, held of the Bishop of Bath and Wells, and granted by indenture, dated the 5th June, 1751, to him and his heirs, for the lives of himself, the said Robert Blake, his eldest son Robert Blake, and John Credland, made his will, dated the 4th February, 1752, in the presence of three witnesses, and thereby devised to Fraunceis and Credland and the survivor, and the heirs and executors of such survivor, the said lands and premises, and all his estate and interest therein, subject to a mortgage thereon of 930*l.* which he had borrowed to pay his sister's portion, and to purchase two of the lives of the said lease, upon trust that the said Fraunceis and Credland, and the survivor of them, should receive the rents and profits of the same, and pay out of the same unto his wife Elizabeth, the sum of 40*l.* *per annum*, during her life; and the further sum of 20*l.* *per annum*, making 60*l.*, in case his son Robert should die without issue, and to allow his son Robert for his education and maintenance, till he attained twenty-one, as much as his trustees should think fit, and when he came of age, then his trustees were to be seised of the said premises to the use of his said son Robert, and the heirs male of his body lawfully begotten; and the said testator declared his intention and will to be, that if his wife should happen to be with child, at the time of his death, that such child should, if his said son should die without issue, inherit all the said lands and hereditaments, and with the like limitations with which his son Robert was to inherit, by that his will, and he did thereby give such child with which his wife should be *enceinte* at the time of his death 500*l.*, to be \*paid when such child should attain the age of twenty- [\*179] one, and also 20*l.* *per annum* for the maintenance and education, which sum of 500*l.*, and also 20*l.* *per annum*, his trustees were to raise out of his estates, by sale, mortgage, lease, or otherwise. The testator afterwards made a codicil without any date, and thereby reciting that his son John was not born at the time of making his will, he thereby ordered his trustees to

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1815.—Blake v. Luxton.

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• raise the sum of 600*l.* out of the said estates, to be paid at twenty-one, and the farther sum of 20*l.* for his maintenance and education in the meantime ; and he declared his will to be, that in case his son Robert died without issue of his body lawfully begotten, that then his son John should inherit all his real and personal estate, in the same manner that his brother was to inherit.

The testator died, leaving Elizabeth, his widow, Robert Blake, his eldest son, and the plaintiff John, his only other son, and upon Robert's coming of age he entered into the possession of the said estate, and some time afterwards, but the same being during the plaintiff's minority, Robert Blake cancelled the said lease by tearing off the seal, and thereupon the bishop of Bath and Wells, on the 6th June, 1770, and without the knowledge of the said trustees or either of them, granted a new lease of the said lands and premises comprised in the said former lease, to him the said Robert Blake and his heirs, for the lives of him the said Robert Blake, of the plaintiff John Blake and John Credland, and the survivor of them.

Robert Blake afterwards died without issue, having first made his will, by which he gave the said property to the defendants.

The present bill was filed by John Blake, the younger son, praying that the renewed lease might be declared to [\*180] \*enure to the uses and trusts of the former lease and to belong to the plaintiff, and the heirs of his body under his father's will.

The defendants, by their answer, submitted that Robert Blake had an absolute estate and interest in the premises ; and they further stated, that after the death of Robert Blake, the plaintiff, in 1784, filed his bill in the Court of Exchequer, against the defendant Frances Luxton, then Frances Blake, widow, claiming to be entitled by virtue of the said remainder in tail to him and the heirs of his body to the said premises, and that the plaintiff

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might have the benefit of the said renewed lease, and that the said cause was heard before the barons of the Exchequer on the 13th July, 1786, when the court decreed that the plaintiff's bill should be dismissed, which decree of dismissal is now in full force, and the defendants insisted thereon in bar of the plaintiff's claim by his present bill.

Mr. *Courtenay* (in the absence of Sir *Samuel Romilly*, who was with him) was heard alone for the plaintiff:—The legal estate in this case being in the trustees, the surrender and acceptance of the new lease by Robert Blake, the son, who was *quasi* tenant in tail of this freehold lease, would not bar the claims of those in remainder under his father's will; nor would his own will have that effect. There is no case short of alienation by such a tenant in tail which has been held to have that operation. This case is also distinguished from all others by the circumstance of there being previous existing trusts at the period of the surrender; the trust for raising and paying the maintenance and provision for the younger son, and for payment of the widow's annuity, was then vested \*in the trustees who never [\*181] joined in the surrender. *Barnard v. Large*,(a) *Carteret v. Carteret*,(b) *Saltern v. Saltern*,(c) *Campbell v. Sandys*,(d) were the principal authorities referred to.

Mr. *Leach* and Mr. *Cook* for some of the defendants; and Mr. *Hart*, Mr. *Roupell* and Mr. *Shadwell* for the rest of the defendants:—The prior decree in this very cause is a complete bar. The argument, however, is in effect that the new lease is void, and yet the bill prays that the defendants may be declared trustees of that lease. The old lease is gone by effluxion of time, and the plaintiff must affirm the new lease or he can have no interest or claim. Upon the pleadings the court cannot say there was no surrender of the old lease, cancelling a lease being a complete surrender if made by the persons entitled to the lease. The court in this case will presume the concurrence of the trus-

(a) Amb. 774.

(c) 2 Atk. 376.

(b) 2 P. W. 132.

(d) 2 Sch. &amp; Lef. 281.

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tees, and therefore an effectual surrender, because there have been forty-five years possession under an instrument which could not have been effectual without the concurrence of the trustees. But suppose, for argument sake, that the trustees did not concur, still a person having an equitable interest as *quasi* tenant in tail may defeat a remainder by any disposition of that equitable estate. It could not be a breach of trust to extend the lease, which would have the effect of giving the widow, who was a *cestui que trust*, a better security for her annuity. The trustees, therefore, might have been compelled to join. An equitable tenant in tail may bar without a legal recovery. The new lease destroyed

Robert Blake's equitable interest in the estate, and this [\*182] being an act *inter vivos*, would \*be sufficient to bar the remainder. In *Doe* on the demise of *Blake v. Luxton*, (a) Lord Kenyon even thought that a will would operate as a bar, (b) which notion could only have arisen from a conviction that a tenant in tail had the absolute dominion. *North v. Champenoon* (c) decides that tenant in tail in equity could alone bar remainders over.

Sir *Samuel Romilly* in reply :—I presume it will not be necessary to argue that a will cannot bar the limitations over, notwithstanding the hasty *dictum* of Lord Kenyon, which has been referred to. The question in this case is, whether the surrender and taking the new lease are sufficient for that purpose? The trustees might be presumed to have joined if it could have been without a breach of trust; but a court of equity will never presume it, if, as in this case, it must have been a breach of trust. There must, therefore, be an actual surrender proved, the legal estate being in the trustees, and they having trusts remaining to perform when the surrender is stated to have been made. But if there was any surrender, the new lease would be subject to the former trusts, *Mansell v. Mansell*, (d) *Moody v. Walters*, (e) and the case of *Lord Lansdown v. March* cited there. Trustees are

(a) 6 Term Rep. 289.

(d) 2 P. W. 678.

(b) 6 Term Rep. 293.

(e) 16 Ves. 283.

(c) 2 Ch. Ca. 63, 78.

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not guilty of a breach of trust according as the object of the recovery suffered is to continue or enlarge, or to destroy the estate. There could be no danger of a perpetuity in this case, because all the trusts were to be performed during lives in being. I admit the trustees might have been compelled to join in renewing the lease for the benefit of the *cestui que trusts*, but then it must have \*been by taking a new lease upon all the [\*183] same trusts. If not, something should be done to confine the effect of taking the new lease, which has not been done. In every case cited some act has been done, some conveyance made, showing an intention to acquire an absolute interest. The case in the Exchequer is to this point only, that a tenant in tail of a freehold lease may by surrender bar the remainders over where there are no other trusts appearing; but this case now presents to the court the fact of there being other existing trusts at the time of the surrender, the distinction arising upon which has in no case been considered. The decree in the Exchequer should have been pleaded, if meant to be insisted on as a bar; it cannot be so set up by the answer, and besides which it ought to have been distinctly proved.

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*February 24th.*—This day the Vice-Chancellor delivered his judgment, in which, after stating the case very fully, he observed, that upon calling for the codicil of Robert Blake, he found that the word "leaving," before the word "issue," was not in the original codicil, though stated upon the pleadings, the words only being "without issue," and which therefore put an end to a question which had been agitated at the hearing with respect to some leaseholds for years which the testator had died possessed of, the absolute interest in the same clearly vesting in Robert Blake, the son. With respect to the freeholds for lives, it was also clear that a recovery stated in the answer to have been suffered by Robert Blake, must also be put out of the question, as not having any operation to bar the plaintiff's remainder, inasmuch as freeholds for lives were not within the statute *de donis*,

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1815.—Blake v. Luxton.

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and not even a descendible freehold, the heir taking as [\*184] special occupant only. \*Robert Blake, the son, was therefore under the will of his father, not tenant in tail of the freehold lease in question; but, as he had been properly called, he was only *quasi* tenant in tail of them, with remainder to the plaintiff in the event of Robert Blake's dying without issue. Robert Blake, the son, did die without issue, and the plaintiff's claim thereupon accrued, and which was so long ago as the year 1782. Soon afterwards, that is to say, in 1784, we find him asserting his right by filing a bill in the Court of Exchequer, in which the very point now in issue in the present cause was also then put in issue in that suit. It was not proved in that cause that any surrender in writing of the old lease was made by Robert Blake, the son; but the same rested on the fact of cancellation by his tearing off the seal, as it appears in the present cause. Nor did the plaintiff upon that occasion want the most able counsel to assert his right which the profession could afford, it appearing that Mr. Maddox and the present Lord Chancellor then sustained his case; the counsel for the defendant being Mr. Burton and the present Lord Redesdale. The judgment of the court was delivered in the absence of the their Lord Chief Baron, by Mr. Baron Eyre, one of the ablest judges that ever adorned the bench, and the plaintiff's bill was dismissed without costs. The plaintiff after that, namely, in 1795, brought his ejectment, and a special case being reserved for the opinion of the Court of King's Bench, the same was fully argued upon the effect of the surrender of Robert Blake, in defeating the remainders over, upon which Lord Kenyon, and the other judges of that court decided against him. Lord Kenyon was even inclined to think, that remainders after such an estate could be barred by will. From the history given of the present case in the Exchequer by Lord Redesdale in [\*185] *Campbell v. \*Sandys*,<sup>(a)</sup> it appears that no such idea was however entertained either by the Court of Exchequer or by any of the counsel concerned, as that the will would have

(a) *Ante*, p. 181.

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 1816.—*Blake v. Luxton*.
 

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operated to bar the plaintiff. The case referred to by Lord Kenyon of *Grey v. Mannock* did not so decide, and it is a curious fact that Lord Kenyon, though young in the profession when he took the note, in mentioning Lord Northington's opinion which he threw out in *Grey v. Mannock*, should have added a *quære* to that, thereby showing that the judgment of his early life upon the point was better than his subsequent one. I notice this merely to dispose of the point that the will could not bar, and the late case of *Dillon v. Dillon*(a) is an authority to the same effect.

Notwithstanding the above proceedings, the present bill having been filed in 1812, it becomes necessary for this court to consider whether it will set aside the former decree made between the same parties and upon the same point. With respect to the old lease, it expired in 1798, all the lives named in it being then gone. The renewed lease is now claimed by the plaintiff. I must observe that it could be no breach of trust in the trustees in renewing a lease instead of letting it expire, supposing that they had so renewed it, or at least concurred in it. The additional disadvantage then of the old lease being expired must be added to the objections made to the present bill, that the same point was before determined between the same parties. With respect, however, to the general power of a *quasi* tenant in tail to bar remainders over by deed during his life, that is laid down as a clear principle in Mr. Fearne's book,(b) and for which he refers to various authorities, as the *\*Duke of Grafton* [\*186] v. *Hammer*.(c) That a surrender will also be sufficient for that purpose was held in the case of *Baker v. Bayley*.(b) It is quite clear then that if there had been no antecedent trusts by the said Robert Blake, that he might have barred the remainder to the plaintiff. The question then is, whether there being existing trusts prior to the estate tail in Robert Blake, can prevent his so doing? But the same answer may be given now as has been given before to that objection, which is, that the remainder-

a) Ball & Beatty's Rep. 95.

(c) 3 P. W. 266, in the note.

(b) Fearne's Cont. Rem. 409, edit. Butler. (d) 2 Vern. 225.

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man has no equity to call upon the party making the surrender, and to say that it was made for the benefit of him the remainder-man. If the surrender has had the effect of making a valid disposition of the lease, the remainder is gone; if not, let the remainder-man apply to a court of law. That the circumstance of a prior charge not being satisfied will not prevent a tenant in tail from barring remainders over, was the very point decided in the case of *Basket v. Peirce*(a) and several other cases. It is also well known that the point was very much agitated by conveyances in the *Marquis of Bath's Case*, when the opinions of the late Mr. Maddox, the present Lord Chancellor, and Mr. Fearn, which are now all in print,(b) were all unanimous that an equitable recovery suffered by the owner of the first vested estate tail was valid. Mr. Fearn there refers to the cases of *Wallis v. Crimes*,(c) and *North v. Champemoor*,(d) *Basket v. Peirce*,(e) *Bale v. Coleman*,(g) and *Barnardiston v. Carter*(h) before the [\*187] \*lords in 1717, all of which are authorities to the point that the remainder may be barred notwithstanding the existence of prior trusts. But those trusts are not disturbed at all. So in this case the surrender could only defeat the remainder without the least affecting the prior charges. With respect to Robert Blake's intention to defeat such remainder, which it has been argued did not appear, I answer, that having taken an estate to himself and his heirs, it shows that he intended to put an end to the estate as it before existed with the remainder. The new lease speaks for itself, and shows the intent as well as the power. In every point of view, therefore, even if the case were open, I am of opinion that Robert Blake has barred the remainder to the plaintiff, and his bill must be dismissed; but advertent to the circumstance of the former suit instituted by him in the Exchequer, I think it must be dismissed with costs.

(a) 1 Vern. 226; 2 Ventr. 346.

(b) 2 Collect. Jurid. 214 to 245.

(c) 1 Cases in Chan. 89.

(d) Ib. 63, 78.

(e) *Ante*.

(g) 1 P. W. 145, and 2 Eq. Cas. Abr. 309.

(h) 2 Bro. Parl. Cases, 1.



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1815.—*Fraser v. Lloyd*.

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## FRASER v. LLOYD.

1815: 21st, 23d and 25th February.

After verdict in an action in the Petty Bag, an application to discharge the defendant for not having been charged in execution within two terms, must be made to the King's Bench; but the court to remove any difficulty made a collateral order.

FRASER, one of the sixty clerks, brought an action in the Petty Bag against Lloyd, on a promissory note for 300*l*. Lloyd put in bail. The cause went to issue, the record was delivered into the King's Bench, and a verdict was found there for the plaintiff, and judgment entered up. The defendant then surrendered himself to the Fleet prison in discharge of his bail; but not having been charged in execution in time, he now moved before the Lord Chancellor to be discharged.

\*Mr. *Heald* in support of the motion.

[\*188]

Mr. *Rose* opposed the motion upon the ground that this court had no jurisdiction, the record having been sent to the King's Bench, from which it was never remanded, and, therefore, the application ought to have been to that court. *Jefferson v. Dawson*(a) was referred to.

Mr. *Heald*, in reply, contended that the defendant having been committed to the Fleet prison by an order of this court, that this court must have the power to discharge him, and that the Fleet prison was the prison of this court, over which the King's Bench had no jurisdiction, and could not, therefore, discharge him out of it.

The motion stood over, in order that the Lord Chancellor might confer with some of the common law judges upon the subject.

(a) 1 *Saund. Rep.* 22.

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 1815.—*Barron v. Martin.*


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*February 25th.*—This day the Lord Chancellor said that he had conferred with Lord Chief Baron Thompson upon the subject, who was conversant with the practice both of the common law and equity, and that he thought that there must be an order of the Court of King's Bench.

The LORD CHANCELLOR, however, added that in order to remove any difficulty he would make a collateral order of the same date.

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[\*189] *March 2d.*—\*This day Mr. *Heald* again mentioned the case to the court, stating that Mr. Justice Bailey, upon an application made to him at chambers, had made an order of the Court of King's Bench for the defendant to be discharged, intimating an opinion that this was a case of concurrent jurisdiction. Some difficulty, however, had arisen in drawing up the concurrent order of this court.

The LORD CHANCELLOR directed the register to draw up the order.

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#### BARRON v. MARTIN.

ROLLS.—1815: 3d and 6th March.

Redemption refused though account delivered within twenty years, it being so delivered without any authority, by a receiver and manager of the estate, and the employer being in a state which rendered him incapable of managing his affairs.

By deeds of lease and release, dated the 1st and 2d of August, 1745, Joseph Sharpe mortgaged a freehold estate in Wicken, together with copyhold premises in Claveringbury, to John Martin and his heirs, to secure 1,250*l.* with interest. The mortgagee took possession soon afterwards, and died in March, 1767, leaving John Martin, his eldest son and heir at law, who as such took possession of the said freehold estate, and James Martin, his youngest son and customary heir of the said copyhold, who pro-

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1815.—*Barron v. Martin.*

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cured himself to be admitted tenant of the same. The mortgagee, soon after his taking possession, appointed William Law receiver and manager of the said premises; and he dying in 1778, John Claridge was appointed by the said John and James Martin to that office. By a letter from Law to the widow of Sharpe, dated 6th March, 1774, he informed her, that at the desire of Martin he had made \*out her account, [\*190] and expressed Martin's desire that she should pay off the mortgage. After Claridge's appointment, John Martin, in various conversations with Claridge, stated to him that his title was imperfect, and about 1783 or 1784 desired him to apply to the solicitor of the mortgagor to see if anything could be done by pecuniary means to perfect his title. Claridge accordingly, about that time, offered the mortgagors some compliment or remuneration to join with John Martin in perfecting the title; but which offer was not acceded to. In 1792 or 1793, Claridge, at the desire of the mortgagors, delivered an account or statement to them of the rents and profits, but, as he himself admitted upon his cross-examination, it was without any direction or authority from John Martin so to do, he being then, and having been for some time before, of unsound and disordered mind, and incapable of managing his own affairs. An account had been kept in a distinct book of the rents and profits of the said premises received, and of the mortgage money and interest down to Michaelmas 1772, with the balance struck, whereby 2,546*l.* 4*s.* appeared to be then due upon the said mortgage; and the rest of the said book, which was kept by Claridge after his appointment, consisted of annual accounts of the rents received by him from the said estates, and the disbursements made by him from Michaelmas 1774 to Michaelmas 1794.

The bill was filed the 15th October, 1800, by the co-heirs of Sharpe, praying a redemption.

The case was argued by Mr. *Leach* and Mr. *Huddleston* for the plaintiff; and by Sir *Samuel Romilly*, Mr. *Bell* and Mr. *Treslove* for the defendants.

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 1815.—*Barron v. Martin*.
 

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[\*191]      \*The MASTER OF THE ROLLS took time to consider, and this day gave judgment to the following effect:

It is now decided, that twenty years' possession by a mortgagee will *prima facie* bar a right of redemption; and it lies on the mortgagor to show that such length of possession ought not to produce that effect. Here there has been a possession of about sixty years in the mortgagee. It is not, however, material to consider the effect of anything done above twenty years before the filing of the bill, as what passed in 1772 or 1774. The question is, whether anything has taken place within twenty years before October, 1806, when the bill was filed to give a right to redeem? The circumstances that are relied upon are: 1st. The application by Claridge about perfecting the title; and, 2d. The application made by the mortgagors to Claridge about delivering the accounts. As to the first, the way that transaction is stated in the bill is, that some time after Claridge had been appointed the receiver, he was directed by Martin to make out the accounts due upon the mortgage, and of the rents received, and to propose to the plaintiffs either to pay off the mortgage or to sell the equity of redemption; and that in pursuance of such directions, he did within the last twenty years, as plaintiffs believe, call at the house of one of the plaintiffs, and there stated that Martin had ordered him to make out the accounts, and if it did not suit the parties to pay off the mortgage, the Martins would give something handsome to the mortgagors if they would make a title, meaning thereby that the Martins would purchase the equity of redemption. It is unnecessary to consider what effect such a transaction would have had if it had actually happened within twenty years, the fact being that it took place in 1783

[\*192] or 1784, and \*therefore upwards of twenty years before the filing of the bill. But it is argued that some of the conversations in which John Martin stated to Claridge that his title was imperfect, were within twenty years. In the first place the *onus* lies on the mortgagor to show that fact in order to defeat the effect of the possession; secondly, even if we could proceed upon inference, the presumption is that the conversations

1815.—*Barron v. Martin*.

were preliminary to the application, for otherwise they must have been without motive or object. But lastly, I think the conversations were quite insufficient to prevent the possession of the mortgagee from operating to bar the right of redemption, without saying that parol evidence should be altogether excluded in these cases. As to that subject I agree with the Master of the Rolls in *Whiting v. White*(a) and with the Vice-Chancellor in *Reeks v. Postlethwaite*,(b) that it should at least be clear and unequivocal. In the present case the parol evidence is not so strong as it was in either of those two cases. Then as to the other circumstance, of the application to Claridge, and of the account delivered by him, that certainly took place within twenty years. If that account had been delivered by the mortgagee himself, supposing him competent, it would certainly have been sufficient, according to the principles of this court, to entitle the plaintiffs to redeem. But Claridge was only receiver and manager of the estates, and could not, by delivering such an account, bind his employer who had given him no authority so to act. It was not even argued as constructively the act of the mortgagee, but only as amounting to evidence that the mortgagee kept mortgage accounts. But I think that in this case the evidence does not afford any \*inference that accounts were kept within twenty [\*193] years. It would have been easy for anybody who knew what the debt had been, to make out such an account as Claridge did. I take it from the answer, that down to the year 1772 something like a mortgage account had been kept; but after Claridge's appointment the account seems only to have been kept as between a receiver and a land-owner, with this sole difference, that it was kept in a distinct book by itself. That circumstance is not sufficient to give a right of redemption. The bill, therefore, must be dismissed, but without costs.

(a) *Ante*, p. 1.(b) *Ante*, p. 161.

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 1815.—*Stanhope v. Pilkington.*


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STANHOPE *v.* PILKINGTON.

Before the Vice-Chancellor.—1815: 11th and 13th March.

Equity cannot compel a resort to commissioners appointed under an act of Parliament to settle disputes between parties arising from a navigation: a lease for years having expired, and the landlord proceeding to recover possession.

By an act passed in the 10th and 11th Will. III, for making the rivers Aire and Calder navigable, commissioners were empowered by means of a jury to assess such *damages and recompenses* as they should adjudge fit to be awarded to the owners and occupiers of such lands or tenements, weirs or mills, as should be used or damnified in the making such rivers navigable. In 1705, the goit or dam of Wakefield mills was made use of in carrying the said navigation to that town. By the 14th Geo. III, which was a further act for the above purpose, the said commissioners and their successors are empowered to determine what satisfaction, either by *rent or sum in gross*, persons should have in respect of loss or damage done to their estates and premises by the said navigation. On the 7th June, 1797, Sir Thomas Pilkington demised the said Wakefield mills to the plaintiffs for fifteen years, at a rent of 40*l.* The said [\*194] lease \*having expired, the defendants, who were trustees under the will of Sir Thomas Pilkington, in June, 1814, gave a notice to the plaintiffs to quit, and afterwards brought an ejectment to recover possession of the said demised premises.

The bill, which was filed the 13th February, 1815, prayed that the dispute respecting the said mills might be directed to be heard and determined by the commissioners appointed by the said acts, and for an injunction in the meantime to restrain the defendants from proceeding in the said ejectment.

The defendants demurred generally.

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*March 18th.*—The VICE-CHANCELLOR on this day gave his

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1815.—*Myrne v. Dickinson.*

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judgment. He was of opinion, that 'neither by the acts which had been passed, nor by the contract which had been entered into between the parties, a court of equity could interfere to give the relief prayed. No obstacle was stated as impeding the commissioners themselves from acting. The agreement for a lease for fifteen years having expired, the legal rights of the parties returned to them. There was nothing expressed or implied to be done between them after the expiration of that time. Any injury arising from the interruption of the navigation, considering it in the light of a public road, was the subject for a new contract between the parties. A court of equity could not supply the want of it. In contracts between landlord and tenant, a court of equity cannot, upon the ground of benefit of the tenant, restrain the landlord at the expiration of the lease from exercising his legal right. Each party is left the same as if no contract had been made. The plaintiffs in this case should \*have applied before their term expired, in or- [\*195] der to have a fresh agreement entered into. Instead of so doing, the plaintiffs lie by. Equity cannot then stop the defendants who have been diligent, in favor of the plaintiffs who have been guilty of *laches*. It cannot remedy or cure that *laches*, the opposite party never having impeded or obstructed them. There was nothing under the acts, or the agreement enabling this court to act or to give a continuance to the contract after the fifteen years had expired. The legal rights of the parties then arose, and each must be left to deal as they think proper with those rights.

Demurrer allowed.

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MYLNE v. DICKINSON.

1815: 14th March.

Injunction granted upon bill filed and affidavit, to restrain proceedings in an arbitration, under the circumstances.

THE plaintiff having agreed to purchase of the defendant a patent right for making iron buoys, which the defendant had rep-

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1815.—*Mylne v. Dickson*.

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resented as very profitable, but some delay taking place on the part of the plaintiff, the defendant wrote a letter to the plaintiff, stating that he had received an order from the commissioners of the navy for a certain number of the said buoys, but did not know how to act with the said order in consequence of the delay in completing the agreement. The plaintiff thereupon paid 8,000*l.* to the defendant, and an agreement in writing was entered into, whereby the points in difference were to be referred to arbitration. The defendant afterwards wrote a letter to the commissioners of the navy, in answer to the said order, stating [\*196] that he had \*changed his opinion as to the utility of the said invention, and had therefore disposed of the patent.

The bill was filed to have the 8,000*l.* returned, and that the defendant might accept a re-assignment of the patent.

Sir *Samuel Romilly* now moved upon the bill filed, verified by affidavit, and upon notice, to restrain the proceeding in the said arbitration.

Nobody appeared to oppose the motion.

THE LORD CHANCELLOR:—This is certainly a singular motion; but I think there is principle enough to support it, as it goes upon the notion of the arbitration being a part execution of the agreement, which the bill strikes at the root of.

Injunction granted till answer or further order.

END OF THE FIRST PART.



# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY,

IN

EASTER TERM, 1815.

IN THE FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III,

AND THE SITTINGS BEFORE AND AFTER IT.

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\*GOOD *v.* BLEWITT.

[\*197]

1815: 13th April.

Motion to bring into court the shares of prize-money belonging to claimants abroad, who had not come in under the decree in this cause, refused. See 13 Ves. 397.

THIS was a motion to pay a sum of money into court appearing to belong to claimants who had not yet come in under the decree made in this cause, and who were still at sea. The bill was filed on behalf of the captain and all other the unsatisfied mariners and persons entitled to share in prize-money arising from a Dutch East Indiaman, which had been captured. The decree directed an inquiry as to who were the parties entitled to share the net produce arising from the capture. The master had made his report, and which stated a schedule of persons about thirty in number who had not come in, but who appeared to be claimants.

\*Sir *Samuel Romilly* and Mr. *Wetherell* for the motion; [\*198]  
Mr. *Leach* and Mr. *Hall* against it.

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 1815.—Wall v. Atkinson.
 

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THE LORD CHANCELLOR :—This is like the case of a creditor's bill, where others if they choose may come in, and thereby, to borrow an expression from the Scotch law, *sist* themselves parties to the suit. But such creditors if they choose it need not come in. So parties entitled in this case need not come in under the decree. Creditors not coming under a decree may afterwards file a bill for themselves. I cannot therefore see my way in complying with this motion to have paid into court the shares of claimants who may not choose to come in and become parties to this suit.

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WALL v. ATKINSON.

1815: 15th April.

Certificate discharges attachment against an executor for non-payment of a sum of money.

SIR SAMUEL ROMILLY and Mr. Cullen moved that Ralph Longstaff, a defendant in this cause, might be discharged out of custody under an attachment for non-payment of a sum of 500*l*. By the decree of June 20, 1811, an account was directed against Longstaff as an executor of Ralph Wall, the testator in the cause. By an order of March 30, 1813, Longstaff was ordered to pay the sum of 500*l*. into the bank as part of such personal estate which had come to his hands. An attachment issued previous to the month of August, 1813, for breach of the said order, upon which Longstaff was committed to prison. On August 18, 1814, a commission of bankrupt was issued against him, and [\*199] \*on March 29, 1815, he obtained his certificate.

In support of the motion it was contended that the certificate discharged a person in custody for non-payment of a sum of money under an order of this court. A debt directed to be paid, though not a duty to be performed, as the executing a deed, will support a commission of bankruptcy. *Ex parte Parker*(a) was a

(a) 3 Ves. 554.

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1815.—Faith v. Dunbar.

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case of privilege from arrest under an attachment and allowed. But *Baker's Case*(a) is in point with the present case.

Mr. *Bell*, in support of the order of commitment. The words of the statute are confined to persons in execution under any debt, which he contended applied only to debts for which an action might be brought. In *Baker's Case* it was stated by the court that an action of debt might have been brought for the demand. The present was a mere equitable demand against an executor, and no case could be found applicable to it.

THE LORD CHANCELLOR:—As this demand might have been made the subject for a commission of bankruptcy, or might have been proved under a commission, a certificate will bar such a debt, and process to compel payment of a debt must therefore be discharged the same as the debt itself.

He was ordered to be discharged.

(a) 2 Str. 1152.

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\*FAITH v. DUNBAR.

[\*200]

1815: 15th April.

A receiver having been appointed, the executor being out of the jurisdiction; on administration afterwards taken out, it was referred to the Master to reconsider the appointment of receiver, regard being had to the administration granted.

THE executor being out of the jurisdiction in Scotland, a receiver was appointed in this case, under the late act of Parliament.(b) Administration having been since granted to Cosby, a motion was now made on the behalf of such administrator, for an injunction to restrain the receiver from acting.

Mr. *Leach* in support of the motion. Mr. *Horn* against it.

(b) Stat. 36, Geo. III, c. 90.

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 1815.—Gregory v. Gregory.
 

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THE LORD CHANCELLOR:—If administration is granted, the executor being abroad, but who afterwards returns, the administration is thereby at an end. The statute has enabled a receiver to be appointed in the case of such absence of the executor, but it seems defective in not providing for the accounting by such receiver. In the present case I think the best thing which I can do is to refer it to the Master to reconsider the appointment of a receiver, regard being had to the circumstance of administration having been granted.

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[\*201]

\*GREGORY v. GREGORY.

ROLLS.—1815: 18th April.

Bill to set aside a purchase by a trustee for himself and his children; after a lapse of eighteen years, dismissed upon the length of time only.

WILLIAM GREGORY by will duly executed, dated February 11th, 1778, devised his freehold estate in Shalden, subject to an annuity of 10*l.*, to William Gregory, his son, and his freehold estates in Grewell and Upnatly (subject to an annuity of 20*l.*, to William Horner and Jane his wife for their lives,) to his son James Gregory and Theophila his wife, and his friends Lyon and Cross and their heirs, in trust to receive the rents and profits until the youngest child of James Gregory attained twenty-one, and then as to the said estate in Shalden, to sell and dispose thereof, and divide the money among the then surviving children of James Gregory and the children of testator's son, John Gregory, deceased; and as to the estates at Grewell and Upnatly, to James Gregory for life, and after his decease the same to be also sold, and the money to be equally divided amongst the said testator's said grandchildren.

James Gregory, as acting trustee, entered into the possession of the said estates, and continued so till his death, in 1793. In July, 1793, shortly before his death, James Gregory purchased of the three children of John Gregory, who were then all of age,

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1815.—Gregory v. Gregory.

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their shares and interests under the said will of their grandfather at the price of 250*l.* each, being 750*l.* for the whole, and by indentures of lease and release dated July 11 and 12, 1793, in consideration of 750*l.*, they conveyed their estate and interests in said testator's real estates to James Gregory for life, and after his decease to the said defendants in fee, who were James Gregory's \*children. James Gregory dying on Decem- [\*202] ber 10, 1793, the defendants took possession of the said estates.

The bill filed by two of John Gregory's children and the representative of the third, charged that the consideration for the said conveyance was grossly inadequate, that the plaintiffs were ignorant at the time of the value of their interests, that James Gregory was at the period in question dangerously ill and died soon after that the plaintiffs were in indigent circumstances, and that advantage was taken of them.

The prayer of the bill was that the said conveyance might be declared void and set aside.

It was proved on the part of the plaintiffs, by Hankin, a surveyor, that the whole of the said estates were in 1793 worth 4,800*l.*, and are now worth 6,216*l.* Another witness confirmed the said valuation; James Gregory was also proved at the date of the said transaction to have been in ill health, having swollen legs and a complaint in his chest, and that he never recovered. Several witnesses deposed to the circumstances of John Gregory's sons, in July, 1793, as being indigent, one being a working watch-finisher, earning ten and sixpence to twelve and sixpence per week, and another a barber and hair-dresser, in a state of poverty, with three children, and who had since gone to sea; and that the husband of the other plaintiff, who was the third son, and is since deceased, was also, in 1793, in the same trade of a barber and hair-dresser, and his wife obliged to take in washing.

Mr. *Hart* and Mr. *Barber*, for the plaintiffs, argued that the conveyance in question was void, being a purchase by a trustee,

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 1815.—Gregory v. Gregory.
 

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[\*203] \*whose duty it was to sell the estate at the best advantage, that he had purchased it himself at a price grossly inadequate, and that the length of time was not sufficient to bar the plaintiff's right to relief in equity.

Sir *Samuel Romilly* and Mr. *Agar*, for the defendants, contended that *cestui que trusts* may sell to their trustee, provided there is no fraud in the transaction, *Coles v. Trecothick*.(a) A fair price was paid in the present case, it being only for a moiety, and part of it merely reversionary; and the subsequent rise in the value of land, which was the cause of the present bill, afforded no ground for relief.

Mr. *Hart* in reply :—A trustee before he can himself purchase must have denuded himself of that character. Neither will his taking the conveyance to his children protect them, *Huguenin v. Baseley*.(b) The trustee in this case was never out of possession. Relief has been given in equity against transactions of this sort, after an equal lapse of time with the present, as in *Purcel v. Macnamara* in this court, and several other cases.

THE MASTER OF THE ROLLS :—There are two questions in this case: 1st. Whether the plaintiffs had originally a ground for setting aside this conveyance; and, 2d. Whether the lapse of time which has taken place is not a sufficient bar? Now I think that if this bill had been recently filed, the plaintiffs

[\*204] would have had a right to have had the sale set \*aside.

James Gregory, the purchaser, was the acting trustee from the year 1778 to the year 1793, and must therefore have acquired a complete knowledge of the situation and value of the estates. It is true the bargain is made for the benefit of himself and his children. But the whole transaction was managed by him only. He chooses that the form of transfer shall be to himself and his children. In principle it must be the same, whether the estates were purchased by him for himself and his children,

(a) 9 Ves. 234.

(b) 14 Ves. 273, 289.

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 1816.—Gregory v. Gregory.
 

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or for himself alone; and the danger must be as great to permit a trustee to purchase in the name of himself and his children, as in his own name. It is clear that he was not discharged at the time of his purchase from his situation of trustee. As to inadequacy of price, one listens with great reluctance to evidence upon that subject, given after a great distance of time from the date of the transaction. It is difficult for surveyors afterwards to say what was then the value of an estate. It is however pretty clearly made out that there was inadequacy of price in this case. If, therefore, the purchase had been recent, I am of opinion that it ought to have been set aside. Then as to the length of time which has elapsed, I do not see any evidence of fraud or circumvention in this case. Can it then be said that there is no distance of time at which circumstances originally entitling a party to relief may be considered as waived or abandoned? Certainly there may. It is only a rule of equity, that a trustee shall not purchase. In all the cases in which length of time has not been allowed to operate against the title to relief, it has been shown that there has been a continuance of the circumstances under which the transaction first took place, as of the distress of the parties, or of the improper influence used, or of some \*other circumstance. Here the parties were independent of the purchaser, or of his bounty. They had also the opportunity of objecting early to the sale. The only circumstance alleged in answer to this is their poverty, which is proved to have been the fact at the time of the purchase. But the evidence as to that stops at the year 1793, and does not in the least show any continuance of distress. Can it then be said that eighteen years which have since elapsed can go for nothing? In *Bonny v. Ridgard*,<sup>(a)</sup> a case before Lord Kenyon, he dismissed the bill merely upon the lapse of time, though he thought that it was a transaction in which, if recent, the court would have granted relief. There would be no security for men's rights if it were otherwise. Upon the ground of length of time, therefore, the bill in this case must be dismissed; but it being upon that ground only, it must be dismissed without costs.

(a) A MS. case, cited by the Master of the Rolls, in *Hill v. Simpson*, 7 Ves. 167.

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 1815.—*Ex parte Baker*.
 

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**EX PARTE BAKER.**

1815: 20th April.

Lunacy. The residence is the proper place at which to execute a commission of lunacy.

A PETITION having been presented for a commission of lunacy against Henry Blackmore Baker who resided in Devonshire, and the court having granted the same, an application was now made on the behalf of the supposed lunatic, that the commission might be executed in London, upon the alleged ground that [\*206] the fact of lunacy could be more fairly tried there \*than in the country; and affidavits were made in support of that allegation.

Mr. *Leach*, Mr. *Bell* and Mr. *Heald* in support of the application. Sir *Samuel Romilly*, Mr. *Hart* and Mr. *Daniel* opposed it.

The LORD CHANCELLOR said, that the course had always been to execute the commission where the party resided. Lord Hardwicke had so held; (a) and also that where the mansion-house of the family was situated, that decided what was to be considered the place of such residence for executing the commission. There might, perhaps, be exceptions to this rule, but they must be strongly made out in evidence by the party contending for them. In the present case he thought that the commission must be executed in Devonshire.

(a) *Ex parte Southcot*, 2 Ves. 401.

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**SIDNEY v. MILLER.**

1815: 20th, 23d and 27th April.

Where a term was created, and no trusts of it declared, but the estate devised to tenants for life with remainders over, the court decided that there was no resulting trust as to the term but that it attended the inheritance.



1815.—*Sidney v. Miller.*

JOHN SHELLEY by his will properly executed, dated April 5, 1782, devised considerable real estates to trustees for the term of ninety-nine years, without impeachment of waste, upon the trusts and confidences nevertheless in the said will mentioned to be thereafter expressed and declared concerning the same, \*and from and after the expiration or other sooner de- [\*207] termination of said term of ninety-nine years, the said testator gave the said estates to the use of Sir Bysshe Shelley for life, without impeachment for waste, with a limitation to other trustees and their heirs during the life of Sir Bysshe Shelley, in trust to preserve contingent remainders; with remainder to the use of Sir Timothy Shelley, a defendant, for his life, without impeachment for waste, with a limitation to the said last-mentioned trustees and their heirs, during his life, in trust to preserve contingent remainders, with remainder to the use of the first and other sons of Sir Timothy Shelley in tail male, with remainders over. And after thereby devising certain other estates therein mentioned, the said testator, John Shelley, by said will gave to the said Sir Bysshe Shelley and Sir Timothy Shelley, and the person or persons in possession of all or any of the said estates thereby devised to them respectively, power to grant such leases in possession, as in the said will mentioned, for any term of years not exceeding thirty-one years; and said testator by his said will bequeathed several legacies therein mentioned, and the said testator thereby gave and bequeathed unto the said Sir Bysshe Shelley, his executors and administrators, all and every the arrears of rent due at his (the said testator's) decease from his settled estates, as well as those devised to the said Sir Bysshe Shelley for his life; and the said testator thereby bequeathed his silver plate to the said Sir Bysshe Shelley for his life, and directed that the same should be enjoyed by the person and persons for the time being in possession of said testator's mansion-house called Field Place, and the estates thereto annexed. And said testator appointed said Sir Bysshe Shelley sole executor and residuary legatee of his said will.

\*There was no declaration of the trusts as to the term [\*208]

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 1815.—*Sidney v. Miller.*


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for ninety-nine years, either contained in or referred to by the will.

Sir Bysshe Shelley was also the heir at law of the testator, and upon his death he entered into the possession of the estates, and received the rents and profits thereof till his death. By his will duly executed, dated November 28th, 1805, he appointed the plaintiffs his residuary legatees, who filed the present bill against Sir Timothy Shelley and the surviving trustee of the term, claiming to be beneficially entitled to the said estates for the remainder of the said term of ninety-nine years as personal estates of Sir Bysshe Shelley.

The question came on upon a motion by the plaintiffs for a receiver.

Sir Arthur Pigott and Mr. Blackburne, for the plaintiffs, contended that the term being raised by the will of John Shelley without any declaration of trust as to it, it belonged to the personal representative, and did not attend the inheritance, and they cited *Levet v. Needham*,<sup>(a)</sup> and a *dictum* of Lord Hardwicke's in *Brown v. Jones*,<sup>(b)</sup> in which his lordship is reported to have said, "it had been determined that if there is no declaration of a term in the case of voluntary settlements and wills, it is a resulting trust, but not in settlements for valuable consideration." *Emblin v. Freeman*<sup>(c)</sup> was also referred to as decided upon the same principle.

Sir Samuel Romilly, Mr. Hart, Mr. Bell and Mr. Wingfield, for the devisees and other defendants, \*contended [\*209] that the rule could only apply where the testator had left property undisposed of, whereas here it was manifest that he had intended to dispose of his estate beneficially to his brother Sir Bysshe Shelley for life, and afterwards to his brother Sir Timothy Shelley, the defendant, and had even directed his plate

(a) 2 Vern. 138.

(b) 1 Atk. 191.

(c) Prec. in Chanc. 541.

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 1815.—*Sidney v. Miller.*


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to be enjoyed with the estate. His intention in their favor would be completely disappointed by postponing their enjoyment till the end of 99 years. There must have been a mistake in the *dictum* ascribed to Lord Hardwicke. The other authorities do not apply. *Davidson v. Foley*,<sup>(a)</sup> before Lord Thurlow, was in favor of the defendants.

The LORD CHANCELLOR in the course of the argument observed; that if a precedent had been before the attorney in drawing the will, he would have used the words "and from and after the expiration or other determination of the said term and in the meantime subject thereto and to the trusts thereof, then, &c." That the probability was the trusts were for jointures for tenants for life in possession, longer terms being usually raised for portions of younger children. The question upon the whole will was, whether the intention was not sufficiently declared without the above technical words, from the power given of making leases, as well as from what he had said as to the plate. Lord Hardwicke's *dictum* surprised him, but he had some manuscript cases of his lordship, and would inspect them.

*April 22d.*—At the sitting of the court this day, the LORD CHANCELLOR said he had not been able to find anything amongst his own manuscript cases, but he had been \*fa- [\*210] vored by Mr. Eden with a manuscript note of Lord Northington's<sup>(b)</sup> of what Lord Hardwicke said in *Brown v. Jones*; and which the Lord Chancellor read to the bar; and af-

(a) 2 Br. Ch. Cas. 203.

(b) The reporter has also been favored by the same gentleman with the above note, which is as follows: "As to the term of 99 years, that is expressed to be to such uses and trusts as are after declared; and there are none declared, and the question is, who is to have this interest undisposed of?"

"This, in the case of a voluntary disposition, would result to the heir at law of the donor, but here the settlement being made for a valuable consideration and by way of contract, the intent of the party is to be considered, which was plainly to settle this estate for the benefit of the issue of the marriage.

"And as to this the assignees are in no better condition than the bankrupt, if he had been plaintiff, to have the benefit of this term. This court would not have decreed to him; for that would have been to defeat the settlement, and been contrary

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 1815.—*Sidney v. Miller.*


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terwards observed that it principally differed from the report in Atkyns in not mentioning *wills*, as well as voluntary settlements.

Sir *Arthur Piggott* in reply :—The note read does not differ substantially from Atkyns. He admitted that the trusts of the will may be defeated by the construction he contended for, but there was no help for it if the law was so. *Davidson v. Foley* does not apply, for there the trusts of the terms were actually declared. The words “in the meantime and subject thereto” not being in this will, the estates for life commence at the end of the term by the rules of law and equity. Whether the [\*211] \*words were omitted by accident or intention does not signify.

THE LORD CHANCELLOR :—This is certainly an important question to be decided upon a motion ; but as the cause is to be set down in a few days, the parties will then have the opportunity of urging anything further. His lordship then stated the will, and the question arising upon it, to be in effect whether the beneficial freehold interests given by the will should be disturbed on account of the trusts of the term not being specified or declared. He had looked into all the cases, and observed that he must be under the painful necessity of giving an opinion contrary to the *dictum* of Lord Hardwicke as reported by Atkyns. But at the end of the manuscript note which had been read, his lordship appears to have said he would not defeat the settlement, or decide contrary to the words of it. By these words it appeared that his lordship thought the intention of the parties must be considered. So I say, if the case is clear that the testator has meant that the parties under the will shall not take till the end of ninety-nine years, it must be so. But if upon the whole of the will the testator intended that the tenants for life should take beneficially, the term of years is then subject to their estates. I think that enough is in the will to show that the tenant for life and those in remainder should enjoy the estates limited to them. My

to the words of it. But it must attend the inheritance according to the subsequent limitations.”

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1815.—*Agar v. The Regent's Canal Company.*

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mind is satisfied *that* was the testator's intent, and that the proposition that the term is in the personal representative cannot be supported.

*April 27th.*—The cause this day came on for hearing, and no objection being urged, a decree was made, in which was inserted a declaration that the term of ninety-nine \*years [\*212] formed no part of the personal estate of Sir Bysshe Shelley, but attended the inheritance according to the will of John Shelley.

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AGAR v. THE REGENT'S CANAL COMPANY.

Before the Vice-Chancellor.—1815: 26th April.

Upon exceptions taken to an answer for insufficiency, the Master may look to the materiality of them, and overrule immaterial exceptions.

THIS case came before the Vice-Chancellor upon exceptions taken to the Master's report upon a reference of the defendants' answer for insufficiency. Forty-nine exceptions had been taken by the plaintiff to the answer. The Master, by his report, stated that he had allowed the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 23d, 26th, 27th, 29th, 30th, 38th and 49th exceptions; but with respect to the said 1st, 2d, 3d, 17th, 19th, 20th, 21st, 23d, 29th, 30th and 38th exceptions, he had allowed the same by reason that it appeared to him that the said defendants, by their said answer, had made discovery in part respecting the several points excepted to, and he therefore conceived, that according to the rules or practice of the court, the defendants were bound to make a full disclosure and discovery. But he conceived the answer to be sufficient in the points excepted to by the 18th, 22d, 24th, 25th, 28th, 31st, 32d, 33d, 34th, 35th, 36th, 37th, 39th, 40th, 41st, 42d, 43d, 44th, 45th, 46th, 47th and 48th exceptions.

Both parties took exceptions to the report, as to so much of it as was against each of them respectively.

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 1815.—*Agar v. The Regent's Canal Company.*


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[\*218] \*This day the VICE-CHANCELLOR gave his judgment.

After stating the general nature of the bill and answer, he observed that the question brought on by the exceptions to the report, was reduced to two heads: 1st. Whether, if points excepted to are irrelevant and immaterial to the points in question in the cause, the Master is competent to consider the materiality or not? or whether he should see only whether it is answered or not? As to this it is contended that if the defendant does not protect himself by plea or demurrer from discovery, he cannot by answer object that questions are not material, unless he has referred the bill for impertinence, which is a course that may be taken where immateriality is objected to the bill. The question whether the Master upon exceptions for insufficiency can consider materiality or immateriality, is of great importance because of daily occurrence. It is, therefore, of consequence that the rule should be understood, in order that the Masters may proceed accordingly. Upon the argument of this case, I inquired if there was any direct authority upon this question, whether a defendant could protect himself from discovery on the ground of immateriality, and was furnished with only one case upon it, *Selby v. Selby*.(a) Lord Commissioner Eyre in that case seems to have thought the practice was different in this respect, between the Court of Exchequer and the Court of Chancery. I have looked into the register's book in order to see what became of the exceptions in that case; it appears that there were six exceptions,

certainly all minute, but which tended, however, to investigate the title; and that all the exceptions \*were allowed. The party not having protected himself from discovery of his pedigree by plea or demurrer, was obliged to make the discovery. In *Sweet v. Younge*.(a) and *Jacobs v. Goodman*,(b) and other cases, the defendant was permitted by answer to resist the discovery. But in no case the question has arisen whether, if the question was wholly immaterial, the defendant can by answer object to the discovery, the above cases being

(a) 4 Bro. 11.

(b) Amb. 353.

. (c) 3 Bro. C. C. 487, nota.

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 1815.—*Agar v. The Regent's Canal Company.*


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where there was a denial of title. By analogy, indeed, it may be argued that the objection should be taken advantage of by demurrer, like any other defect; and Lord Redesdale<sup>(a)</sup> gives as one head of demurrer that the discovery is not material; but the direct question, upon an answer, does not appear to have arisen in any of the printed cases. In the absence of authority, I considered it important to consult the Masters for information as to their usual course of practice in this respect, and I have, therefore, inquired of them; and they have all without one exception, stated their uniform practice to be, that if the questions are quite immaterial they disallow the exceptions, but if the discovery can in any way assist the plaintiff, they allowed the exceptions. In addition to the authority of the gentlemen filling these offices, and who are all of great character and experience, though it is stated in Lord Redesdale's book<sup>(b)</sup> that "a plaintiff is entitled to a discovery of the matters charged in the bill, *provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree;*" yet I have further thought it my duty to communicate with that learned lord himself, who expressed to me that he had not the least doubt that the constant uniform practice \*of the Court of Chancery, in all his time, concurred [\*215] with that of the Court of Exchequer and with the opinion of the Masters. It may also not be amiss to notice the introduction to every answer, which expresses the answer to be to so much as is material for the defendants to answer. A trustee or incumbrancer interested only in part, or heir at law, always answers to so much of the bill as applies to him, and need not answer the rest of it. In the case of a bill requiring an admission of assets, or that the defendant may set out an account; if the defendant admits assets, he is not obliged to set out the account. What would be the consequence of driving every pleader to demur? It would be impossible with the greatest skill to do so: in a case like the present must there be forty-nine demurrers, or one demurrer to forty-nine questions, where

(a) Treat. on Plead. in Chan. 155, last edit. See also Cooper's Eq. Plead. 198.

(b) Page 248 last edit.

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 1815.—*Agar v. The Regent's Canal Company.*


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if the defendant answers to anything he overrules the demurrer? and the material and immaterial parts of a bill, if artfully constructed, are so mixed up as to make it almost impossible to separate and analyze what may be demurred to from what may not. Although, therefore, I have always been excessively cautious and attentive upon the subject of the practice of this court, lest I should be biased in the long experience I had in another court of equity, where they are constantly deciding on immateriality against exceptions, and where such decisions from the injunction which follows are frequently of the greatest value and importance, and as to which practice there I never remember a doubt being entertained during the period of between twenty and thirty years which I practiced there; yet I am clearly of opinion that the practice of the Court of Chancery in this respect is the same. No inconvenience has been known to arise from it, or it would have been corrected by appeal; and I wish, therefore, as far as lies in my power, to put the practice out [\*216] of all \*doubt. Secondly, as to the application of it to this case, the Vice-Chancellor was clearly of opinion that the exceptions in this case were all material, and also that the Master was correct in the rule of practice he had stated in his report, that if the party answers in part he must make a full discovery as to that, and that there was no instance of his being permitted to select such part of a question as he chooses to answer, and refuse the rest if material. *Taylor v. Milner*,<sup>(a)</sup> *Dolder v. Huntingfield*,<sup>(b)</sup> and all the cases before the Lord Chancellor, state that point clearly. All the exceptions therefore taken by the plaintiff to the Master's report were ordered to be allowed, and those taken by the defendant to the report were ordered to be disallowed.

(a) 11 Ves. 41.

(b) *Ibid.* 283.



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1815.—Lushington v. Boldero.

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## LUSHINGTON v. BOLDERO.

ROLLS.—1815: 26th and 27th April.

A will devising estates for life without impeachment of waste, not revoked by a codicil directing the trustees to let until tenant for life married, such leases under restrictions, one of which was the leases should not be unimpeachable of waste.

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JOHN BOLDERO by his will duly executed, dated December 31, 1785, devised to trustees his manors or lordships of Aspeden and Berkesden, and his capital mansion-house of Aspeden Hall, with the appurtenances and all other his freehold messuages, tenements and lands, in Aspeden, and at Luffen Hall and Cromer, to have \*and to hold the same unto the [\*217] said trustees, their executors, administrators and assigns, for and during, and unto the full end and term of one thousand years, upon trust as therein mentioned; and subject to the said term of one thousand years and the trusts thereof, he gave and devised the said manors or lordships, hereditaments and premises, unto and to the use of his son Charles Boldero, and his assigns, for and during the term of his natural life, without impeachment of waste, with remainder to other trustees, and their heirs, during the life of Charles Boldero; and after his decease, to the use of the first and other sons of the said Charles Boldero in tail male, with remainder to Henry Lushington, during the term of his natural life, without impeachment of waste; with remainder to the said trustee during his life, and after his decease to the use of the first and other sons of Henry Lushington in tail male, with remainders over. The said testator, John Boldero, afterwards made a codicil to his said will, which codicil was duly executed, and dated August 22, 1787; and he hereby ordered and directed his first-mentioned trustees, with all convenient speed after his death, for such time, and so long as his son Charles Boldero should continue unmarried, from time to time to demise, grant, lease and to farm let his capital messuage of Aspeden Hall aforesaid, with its offices, buildings, gardens, orchards and appurtenances thereto belonging, or therewith held and enjoyed,

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 1815.—*Lushington v. Boldero*


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and his park, called Aspeden Park, and the lands which should happen to be in his own occupation at the time of his death, situate in the parish of Aspeden, with the respective appurtenances, and together with the household goods, furniture, pictures and prints, which should be in the said capital messuage or mansion-house at the time of his death, at the best and

[\*218] most \*approved yearly rent and rents that could be reasonably had or got for the same, for any term or number of years in possession, not exceeding the term of twelve years, if his said son Charles Boldero should so long live and continue unmarried; but as there be contained in every such demise, lease or grant, a clause for determining and putting an end to all and every such demise or demises, grant or grants, lease or leases, and the term or terms of years thereby demised, immediately after the expiration of six calendar months next after the marriage of his said son Charles Boldero, and so as there also be contained in every such demise and grant or lease, a condition of re-entry for the non-payment of the rent or rents thereby to be reserved, and so as no clause be contained in any such demise, grant or lease, giving power to any lessee or lessees to commit waste, or exempting him, her or them, from punishment for committing the same, and so as the respective lessee and lessees should seal counterparts of the lease; and his will was that the rents from time to time to accrue and grow due in respect of the said hereditaments so to be demised, should, when and as the same amounted to the sum of 1,000*l.* be laid out in the names or name of the said lessors, and the survivors and survivor of them, his executors and administrators, in the purchase of 3 *per cent.* consolidated bank annuities, and when and as a convenient purchase of freehold or copyhold land of inheritance could be made, that the lessors should invest the said money in the purchase of the same, and settle and convey the same to the same uses, and upon the same trusts as were declared of the lands and hereditaments comprised in the said will.

Charles Boldero was, at the death of the testator, and

[\*219] still continued unmarried, and having become a \*bank-

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1815.—*Lushington v. Boldero*.

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rupt, his assignees caused all the timber standing and growing upon the said park and lands to be marked for the purpose of felling and cutting down the same, with the intent of selling and disposing of the same, as part of the personal estate of the said Charles Boldero.

The bill was filed by the plaintiff as the eldest son of Sir Henry Lushington, being the first tenant in tail *in esse* of the said devised estates, charging that the said codicil was a revocation of the said will, so far as the same gave Charles Boldero an estate for life without impeachment for waste, in the said last-mentioned premises; and that neither he nor his assignees could take any benefit from the said premises, save by the accumulation of the rents and profits thereof and the investment thereof in the purchase of other estates, and praying relief accordingly, and also for an injunction against cutting timber.

Mr. *Leach* and Mr. *Bell*, for the plaintiffs, contended that the codicil was as to the real estate therein mentioned an implied revocation of the will; the disposition of the rents, and the restrictions as to letting and as to committing waste, being inconsistent with the will giving an estate for life to Charles Boldero without impeachment of waste.

Mr. *Hart*, Mr. *Wingfield* and Mr. *Heald*, on the other hand, contended that in all cases of implied revocation, the intention to revoke must be clear and certain. The restrictions in the codicil are confined to the possession of the estate only whilst Charles Boldero continued unmarried. His interest in \*the timber growing on the estate was not at all affected [\*220] by the codicil.

The MASTER OF THE ROLLS was of the same opinion, and said that a revocation of a devise contained in a will by a subsequent codicil must be either by express words of revocation, or inconsistency of devise. As to express words of revocation in this case, there were none. Neither from the directions given to the

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 1815.—*Agar v. The Regent's Canal Company.*


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trustees could it be said that he intended to revoke the will. The trustees were only to let the estate until a particular event happened, without impeachment of waste. What was there in that to take the interest in the timber from Charles Boldero? It was not given to the trustees, and who was then to take it but Charles Boldero? If they should make a lease unimpeachable of waste, there would then indeed be two conflicting interests: not that they *would* do so, but the testator had interposed to prevent it. There was, therefore, nothing to revoke the gift of Charles Boldero.

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[\*221] \**AGAR v. THE REGENT'S CANAL COMPANY.*

1815: 28th, 29th April.

Defendant in contempt, and some exceptions allowed to his answer, and some overruled. If the plaintiff excepts to the Master's report as to the exceptions overruled, as well as the defendant to those which the Master has allowed, the defendant is entitled to a subpoena for a better answer, after the plaintiff's exceptions have been allowed by the court, and the defendant's disallowed.

A MOTION was made on the part of the plaintiff in this cause for a sequestration against the defendants, the company, and for a serjeant at arms against Munro, the other defendant, upon their exceptions to the Master's report upon the insufficiency of their answers being disallowed. The defendants had previously undertaken that the above process should issue unless they put in their answer.

Mr. *Agar* and Mr. *Bell* in support of the motion, argued that the answer being insufficient was no answer, and referred to *Gregor v. Lord Arundel*,<sup>(a)</sup> and that the defendants being in contempt, the plaintiff might proceed with process of contempt, according to the late cases of *Boehm v. De Tastet*<sup>(b)</sup> and *Coulson v. Graham*.<sup>(c)</sup>

(a) 8 Ves. 87.

(c) *Ibid.* 231.

(b) 1 Ves. & Beames, 324.

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1815.—Noble v. Garland.

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The LORD CHANCELLOR, however, thought that the circumstance of the plaintiff having also excepted to the Master's report, distinguished the present case from either of those which had been cited. The defendants might have put in an answer to the exceptions allowed by the Master without arguing their exceptions to the report; but the plaintiff having also excepted to the report, it cannot be expected that the defendants should waive the benefit of so much of the report as was in their favor. They cannot with safety set about drawing the answer till the plaintiff's exceptions are disposed of. If they did put [\*222] in an answer, and it afterwards appeared that the Master was right, the defendants might be chargeable with impertinence. His lordship therefore thought that the defendants, upon the specialties of this case, were entitled to be served with a subpoena for a better answer.

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NOBLE v. GARLAND.

1815: 27th April and 6th and 8th May.

A commission for the examination of witnesses abroad may issue before answer, where the suit is merely for a discovery and commission.

A MOTION was made in this case, that a commission might issue for the examination of witnesses abroad. The answer had not come in. The bill merely prayed a discovery, that a commission might issue for the examination of the plaintiff's witnesses in the islands of Malta and Sicily and at Gibraltar, and for an injunction in the meantime to restrain proceedings in an action brought by the defendants.

Sir *Samuel Romilly*, Mr. *Bell* and Mr. *Wray*, in support of the motion, contended that by the practice of this court the plaintiff was entitled to such an order before answer, although the practice of the Court of Exchequer was different; and two cases in this court were mentioned in which such application had been

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1812.—*Noble v. Garland.*


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granted, *Foderingham v. Wilson*, in March, 1812, and *Yates v. Barker*, in May, 1812.(a)

[\*223] \*Mr. *Hart*, Mr. *Leach* and Mr. *Wingfield*, opposed the motion, because the answer might afford such discovery

[\*224] \*as to render the commission for the examination of witnesses unnecessary. The practice of the Court of Exchequer is admitted to be against such an application. *Foderingham v. Wilson*, by imposing the obligation on the plaintiff of giving security for the paying of the money into court, proves the application to be not usual, and to have been granted under special circumstances.

Sir *Samuel Romilly*, in reply :—The practice of the Court of Exchequer as to injunctions is different from this court, and the rule, therefore, as to issuing commissions ought to be different.

(a) The reporter has been favored with the following note of the above two cases: *Foderingham v. Wilson*, in Chancery, March 6th, 1812, Sir Samuel Romilly moved for a commission to examine witnesses in the islands of Barbadoes and Madeira. An injunction had been obtained for want of an answer. An affidavit had been made by the plaintiff of the facts of his case, and that he was advised and believed that he had a good defence at law, but could not safely proceed to trial in the action which had been brought by the defendant, without the evidence of witnesses resident at Madeira and Barbadoes. The application prayed that the injunction might be extended to restrain the defendant from proceeding to trial in the action at law, and that one or more commission or commissions might issue for the examination of witnesses at Barbadoes and Madeira. Mr. Leach opposed the motion, and stated an affidavit of the defendant's solicitor, setting forth an arbitration in which a sum of money had been awarded to the defendant. The LORD CHANCELLOR ordered, that upon the plaintiff giving security for the sum awarded, and on paying it into court, the injunction should be extended to stay trial, and that the plaintiff should be at liberty to sue out one or more commission or commissions for the examination of witnesses at Barbadoes and Madeira, with liberty to defendant to join in commission, and to either party to sue out a duplicate.

*Yates v. Barker* in Chancery, May 30th, 1812, Sir Samuel Romilly and Mr. Shadwell for the plaintiff, Mr. Wilson for the defendant. A common injunction had been obtained for want of an answer; and it was moved upon an affidavit of the plaintiff, that he might be at liberty to issue one or more commission or commissions, for the examination of witnesses residing in the United States of America; and that the injunction might be extended to stay trial until after the return of such commission, which was ordered accordingly.

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1815.—*Goldsmid v. Goldsmid*.

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The LORD CHANCELLOR observed, that in the case in which security was ordered there was this particular circumstance, that the matter had been under arbitration and an award against the plaintiff signed two days after the arbitrators had authority to act; and therefore the court ordered security to be given in that case. In the two cases cited, the motion had been granted although opposed. In the Exchequer, in policy cases, they are for equitable relief. In those cases it may be proper to wait for the answer. This is a mere bill for discovery to aid an action at law, and for a commission to examine witnesses. I avow that I have been under a mistake if this motion cannot be granted. I will, however, inquire into the practice.

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His lordship said that his present opinion was that the motion may be granted; that the practice of this court was so, and that good sense was with the practice, \*where [\*225] the object of the suit was only a discovery and commission: and if his lordship did not inform the plaintiff of having altered his opinion by Monday, he allowed the order to be drawn up.

The order was made.

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GOLDSMID *v.* GOLDSMID.

1815: 6th May.

Where a trustee refused to consent or object to a marriage, the court referred it to the Master to consider of the propriety of the marriage.

BENJAMIN GOLDSMID, by will dated August 25th, 1798, gave to his brother the defendant, Asher Goldsmid, 5,000*l.* upon trust to invest the same in the purchase of stock in the three per cent. bank annuities, and out of the dividends and interest thereof to pay the sum of 150*l.* per annum for the maintenance of his daughter, the infant plaintiff, until she should attain the age of

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1815.—Goldamid v. Goldsmid.

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twenty-one years or be married, and that the residue of such interest and dividend should accumulate and go along with the capital, and if it should happen that his said daughter should marry under the age of twenty-one years, and that such marriage should be with the previous consent of his executor, then and in such case he directed the capital of the said trust money, and the savings and accumulations thereof, to be paid and transferred to his said daughter; but in case his said daughter should marry without such previous consent as aforesaid, then he directed that such capital and accumulations should not be paid or assigned to her, and the said testator bequeathed the said money to be settled to her separate use for life, with remainder [\*226] to her issue, if any, and in \*default of such issue to and amongst the relations of his said daughter *ex parte paterna*.

The bill was filed by the infant daughter, stating that a proposal of marriage had been made to her, which was in all respects a good and suitable match, but that the defendant would not interfere either by consenting or objecting to the said marriage. The bill prayed that in case the defendant refused the said guardianship and trust in respect of the plaintiff's marriage, that the plaintiff might be entitled to her legacy absolutely, and that it might be referred to the Master to inquire whether the marriage was a suitable marriage.

The defendant by his answer declined any interference in regard to the said proposed marriage.

The cause was heard upon bill and answer.

Sir *Samuel Romilly* and Mr. *Cooke* for the plaintiff; Mr. *Trower* for the defendant.

The LORD CHANCELLOR ordered the refusal of the defendant to interfere by consenting to a dissenting from the marriage, to be taken down by the register, and upon such refusal decreed it to be referred to one of the Masters, to inquire and state to the



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1815.—Ex parte Henderson.

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court whether the marriage was a proper marriage, and if he approved of the same, then to receive proposals as to a settlement to be made upon the infant plaintiff.

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\*EX PARTE HENDERSON.—IN THE MATTER OF [\*227]  
JOHNSTONE.

1815: 6th May.

Construction of Lord Rosslyn's order of the 26th June, 1793.

In a country commission the party is not entitled to twenty-eight days, and as much more time as may be necessary for the post.

THIS was a petition praying that a writ of *supersedeas* which had issued might be quashed, and that a writ of *procedendo* might issue, directing the commissioners to proceed under the said commission.

A commission of bankrupt issued on March 14, 1815, against James Johnstone, of Liverpool. On Tuesday, the 11th April, being the 28th day after the date of the commission, the commissioners met in Liverpool in order to open the commission, and Johnstone was thereupon found a bankrupt. On the same day the solicitor to the commission wrote by the post to his agents in London to insert the same in the Gazette of the Saturday following, being the 15th April. On Tuesday, the 13th of the said month, the agents called at the bankrupt office and gave the said notice, when they were informed that a writ of *superse-deas*, at the instance of Thomas Harrison, had that morning issued, superseding the commission so obtained and opened by the petitioners.

The affidavit of the solicitor to the commission, stated that he did not proceed to open the said commission in consequence of the bankrupt's having made some proposals to his creditors for compromising his debts, and that a meeting of the principal

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1815.—*Ex parte Handerson.*


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creditors had been called for that purpose; that on Monday, the 10th day of April, the bankrupt informed him, the solicitor, that he believed the whole of his creditors would come in to [\*228] his proposal of compromise, but on the following \*morning, being Tuesday, the 11th April, the bankrupt informed the deponent that he found he would not be able to effect his object, and for that reason it was concluded that the commission should be opened on the last-mentioned day.

Mr. *Leach* and Mr. *Cooke*, in support of the petition, relied on the above circumstances, and cited *Ex parte Ellis(a)* as in point.

Sir *Samuel Romilly*, against the petition, insisted on Lord Rosslyn's order of the 26th June, 1793, as not having been fully complied with.

THE LORD CHANCELLOR:—There have been twenty-two years' practical exposition of Lord Rosslyn's order, and I understand such practice to be, that if notice is not given at the bankrupt office within the time mentioned in the order, which is fourteen days in a town commission and twenty-eight days in a country commission, the *supersedeas* is of course. The rule is clear, and the only exception is in the case which has been cited; but there were particular circumstances in that case which must have fixed the attention of the court. I think there was a good deal in the fact in that case of the solicitor who applied for the second commission at the office on Monday, having been previously informed that the party was declared a bankrupt on Saturday, though too late for the Gazette. The question of practice is reduced to this, whether a *supersedeas* should not issue as a matter of course if the bankrupt office has not been informed within the [\*229] fourteen \*or twenty-eight days of the commission having been proceeded in. In the case of the country commission, I think the party is not entitled to the twenty-eight days, and to as much more time as may be necessary for the post.

The petition was dismissed.

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1815.—Stockdale v. Bushby.

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## STOCKDALE v. BUSHBY.

ROLLS.—1815: 10th May

Legacy to the testator's "namesake Thomas, the second son of his brother John."

John had no son of the name of Thomas, but his second son's name was William, who was held entitled.

THOMAS STOCKDALE, by his will dated the 1st July, 1799, amongst other things gave and bequeathed as follows: "I give and bequeath unto my *namesake* Thomas Stockdale, the second son of my brother John Stockdale, over and above his equal share with his brothers, hereafter mentioned as my brother's sons, the sum of 1,000*l.* when he shall attain his age of twenty-one years." And after giving certain legacies therein mentioned unto each of the daughters of his said brother, John Stockdale, the said testator thereby gave and bequeathed all the rest, residue and remainder of his estate and effects whatsoever and wheresoever unto the sons of his said brother, John Stockdale, to be equally divided among them, share and share alike, when and as they should respectively attain their respective ages of twenty-one years; and the interest and dividends arising therefrom, or a sufficient part of each share thereof, to be applied for their maintenance and education, and the said testator thereby appointed the defendants Bushby and Forbes the executors and trustees of his said will.

\*John Stockdale, the testator's brother, had not any [\*230] son of the name of Thomas.

The bill was filed by the plaintiff, who was the second son of the said John Stockdale, but whose name was William, claiming to be entitled to the said legacy of 1,000*l.*

The defendant Bushby, by his answer, stated that the testator shortly before his death gave the said defendant instructions for getting his will prepared, and thereupon declared to the said de-

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1815.—*Stockdale v. Bushby*.

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fendant that he, the testator, wished to leave to the second son, his namesake, 1,000*l.* more than any of the rest of his brother's sons.

The other defendants, Jackson Stockdale and John Stockdale, who were the other sons of the testator's brother John Stockdale, submitted that the plaintiff was not entitled to the said legacy of 1,000*l.*, or to any preference over them.

The cause was heard upon bill and answer.

Sir *Samuel Romilly* and Mr. *Roupell*, for the plaintiff, contended that the plaintiff was entitled to the legacy of 1,000*l.* besides his share of the residue, as he was the second son of the testator's brother, and no other person answered any part of the description given to the legatee of the said 1,000*l.*, and that he was sufficiently described by the will, although the testator had mistaken his christian name.

Mr. *Leach* and Mr. *Clason*, for the defendants, the other sons of the testator's brother, contended that the testator's [\*231] only motive and inducement for giving the \*legacy of 1,000*l.* was that the legatee was his namesake, not as being the second son of his brother, which failing, the legacy also did not take effect, but the plaintiff would only share equally with his brothers. *Campbell v. French*(a) was referred to as decided upon a principle applicable to the present case. Parol evidence was admissible to prove what was the testator's knowledge of facts at the time of making his will; and the defendant Bushby's answer, as not being replied to, was relied on as such evidence.

The MASTER OF THE ROLLS, without hearing the reply, asked how he was to know that it was the testator's intention to give the legacy to his namesake only? That was indeed possible; but was it a condition?

Decree for the plaintiff.

(a) 3 Ves. 321.

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1815.—Tarleton v. Backhouse.

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## TARLETON v. BACKHOUSE.

1815: 21st April.

Bonds, though they necessarily carry interest, given for instalments made up of principal and interest, being the consideration of a purchase or assignment of real and personal estate, are not usurious.

By indenture dated the 13th March, 1808, between Daniel Backhouse of the first part, Edmund Thornton of the second part, and John Tarleton of the third part, reciting a partnership which had existed between Tarleton and Backhouse till about the year 1802, and that disputes had arisen between them \*concerning the affairs of the partnership, and that [\*232] to end the same it had been agreed that Tarleton should purchase the share and interest of the said Backhouse in the partnership estates and effects, both real and personal, at the price or sum of 40,000*l.* to be paid with interest by instalments, and that the interest at the rate of five per cent. per annum on the said sum should be added to the principal, and the amount of the said principal sum and interest should be paid by twelve instalments, one of which should be made at the end of every year next after the day of the date of the said indenture, and should amount to the one-twelfth part of the said principal sum of 40,000*l.*, and also to the full interest of the said sum of 40,000*l.* or such part thereof as should from year to year remain due and payable; and reciting that in a computation of the interest so agreed to be paid, it appeared that the same would amount to the sum of 13,000*l.*; and that in pursuance of the said agreement Tarleton had executed and delivered to Backhouse twelve bonds bearing equal date with the said indenture, one of which was conditioned for the payment of 5,833*l.* 6*s.* 8*d.* at the end of one year, another for the payment of 5,166*l.* 13*s.* 4*d.* at the end of two years, another for the payment of 5,000*l.* at the end of three years, another for the payment of 4,833*l.* 6*s.* 8*d.* at the end of four years, another for the payment of 4,666*l.* 13*s.* 4*d.* at the end of five years, another for the payment of 4,500*l.* at the end of six

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 1815.—*Tarleton v. Backhouse.*


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years, another for the payment of 4,333*l.* 6*s.* 8*d.* at the end of seven years, another for the payment of 4,166*l.* 13*s.* 4*d.* at the end of eight years, another for the payment of 4,000*l.* at the end of nine years, another for the payment of 3,833*l.* 6*s.* 8*d.* at the end of ten years, and another for the payment of 3,666*l.* 13*s.* 4*d.* at the end of eleven years, another for the payment of 3,500*l.* [\*233] at the \*end of twelve years, it was witnessed that for the said considerations, Backhouse promised and agreed to convey to Tarleton, his heirs, executors, administrators and assigns, all Backhouse's right, title and interest in all the real and personal estates and effects, debts and property of every description of which Backhouse and Tarleton were jointly seised or possessed, interested in or entitled to.

The above bonds having been executed and some of the instalments having become due, actions at law were commenced by Backhouse against Tarleton to recover the amount of the same. The present bill was thereupon filed by Tarleton for the purpose of rescinding the said contract, and for an injunction to restrain proceeding at law. The defendant having succeeded in dissolving an injunction which had been obtained, a motion was made by him to compel the plaintiff to pay the instalments now due into court.

Sir *Arthur Pigott* against the motion, objected that as the bonds carried interest, and the instalments secured thereby were made up both of principal and interest, that the same were for interest upon interest, and therefore usurious.

Sir *Samuel Romilly* for the motion:—'Though a mortgage and the interest thereof cannot by any present contract carry interest, yet by subsequent contract it may. That however does not apply to any agreement on the sale of an estate, because a vendor may certainly sell for what sum he pleases. In fact it is the price only of the estate, which the bonds secure in the present case, and it is not a loan of money, which is usurious.

[\*234] \*The LORD CHANCELLOR was of opinion that as

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1815.—Shore v. Collett.

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Backhouse might at the end of every year have brought an action, and have had judgment for the principal and interest then due on the bonds, in equity the bonds could not be affected with usury, as the same might be considered as having been called in and the instalments paid: and he also thought that the defendant ought to pay the principal and interest due into court.

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SHORE v. COLLETT.

1815: 11th May.

The reversion of an estate having been put up to sale by auction, describing it as leased with a covenant on the part of the tenant to repair, and the purchaser objecting to the title because no counterpart of the lease was in the possession of the vendors, it being stated to be in the hands of a party under a partition of the estate made some time before: the court thought that such counterpart ought to be deposited for the benefit of all parties, before it could compel the purchaser to take.

THE plaintiffs being seised and possessed of the reversion in fee of certain copyhold or customary estates and premises as devisees in trust under the will of Felix Vaughan, put up the same for sale by public auction. The printed particulars contained a general description of the said estates as follows: "The estates hereafter mentioned are nearly equal in value to freehold, being copyhold under the manor of Tottenham otherwise Tottenham, subject to a fine certain of 18s. 4d. each house, upon death or alienation, free and clear of any heriots, quit-rents or other fine than above stated. The respective purchasers will be entitled to possession and to the improved rents of the several premises described in each lot, on the termination of the ground lease which was \*granted on the 23d March, [\*235] 1716, for 111 years from Michaelmas then next, which lease contains a covenant on the part of the lessee to keep all the premises therein described, together with all other erections and buildings which might be erected and built during any part of the term thereby granted, in good and sufficient repair and

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1815.—Shore v. Collett.

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condition, and so yield up the same at the expiration of the term; with a power for the lessor to enter and give notice of any want of reparation or amendment."

The defendant Collett was the highest bidder of five of the said lots, and thereupon paid a deposit of 20% per cent. on his purchase-money, and signed a memorandum in writing for the completion of his purchase.

The plaintiffs afterwards filed a bill for the specific performance of the said agreement, and the usual reference was made in the said cause to inquire whether a good title could be made by the plaintiffs to the said premises.

The Master, by his report, stated that the counterpart of the lease of the 23d day of March, 1716, had not been produced, but he was of opinion that there was not any sufficient objection to the said title, and that a good title could be made by the plaintiffs to the said premises. And he found that no mention was made in the said particulars of sale, respecting the possession or custody of the counterpart of the said ground lease. And he stated that the defendant requiring to be furnished with an attested copy of the said lease, and a covenant to produce the original counterpart, to enable him to bring actions of [\*236] covenant if necessary, it was in answer stated by the solicitors of the said plaintiffs, that Mr. Moore, the executor of Mr. Foyster (who was seised in fee of an undivided fourth part of the estate in question previously to a late partition thereof, and whose devisees are now entitled to the allotment made upon the said partition to the said Mr. Foyster, in respect of such fourth part), had the counterpart of the said lease which he had produced before the House of Lords, and suffered a copy to be taken, then in possession of the said solicitors of the said plaintiffs; that the said plaintiffs could not covenant to produce the original, it not being in their possession, but that the purchasers would be entitled to a production in the same manner as the said plaintiffs then were. That the counsel of the said de-



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1815.—Shore v. Collett.

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fendant, being of opinion that the defendant, the purchaser, to be secure should have an attested copy of the said lease, with a covenant for the production of the counterpart thereof, the vendors stated that they had applied to Mr. Foyster's executors, and requested them to deposit the counterpart in the hands of some banker in the names of four or five of the persons which are or may be interested in it, which they had declined to do, but agreed to enroll it in the Court of Common Pleas for safe custody. And he found that shortly afterwards the said counterpart was enrolled in the Court of Common Pleas, and under the circumstances aforesaid, it appeared to him that the said plaintiffs had not then acquired to themselves the means of assuring to the said defendant the production of the counterpart of the said lease, or any sufficient evidence of the contents thereof, whenever such production might become necessary for the purpose of enforcing the covenants on the part of the lessee contained in the said lease. And, therefore, although such circumstances might not \*be considered as raising an objection to [\*237] the title of the said plaintiffs, the vendors, yet he submitted to the consideration of the court, whether the said defendant should be compelled to complete the said purchase, until some sufficient assurance should be made to him for the production of the said counterpart as there might be occasion.

To this report the defendant having excepted, upon the ground that the Master ought to have reported that the objections were valid objections to the title, and that therefore a good title could not be made; the exceptions having come on to be argued before the Vice-Chancellor were overruled.

The plaintiffs afterwards moved that the defendant might pay to the plaintiffs the residue of his purchase-money and the interest thereon, and might be also ordered to pay the plaintiffs their costs of this suit to be taxed.

Sir *Samuel Romilly*, Mr. *Bell* and Mr. *Wetherell* in support of the motion.

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 1815.—*Davis v. May.*


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*Mr. Leach* and *Mr. Shadwell* opposed it.

The motion stood for judgment till this day, when the LORD CHANCELLOR said he was of opinion that the counterpart of the lease not being in the possession of the plaintiffs, was not an objection to their title. It was in the possession of one of the parties to the partition. No doubt the parties entitled to the other shares would be entitled to the production of the counterpart of the lease, in order to enable them to proceed against the tenant if necessary. But unless the deed was deposited, he [\*238] would not compel the purchaser to take \*under one of the lessors. It would be too much to put the purchaser to the necessity of filing a bill from time to time to have the counterpart delivered to him as often as he might want it.

His lordship also thought that what was now sought might be ordered upon motion, without putting the plaintiffs to the necessity of setting down the cause on further directions. And it being understood and admitted that the counterpart of the lease had been since actually deposited, his lordship granted the prayer of the motion as to the purchase-money and interest.

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DAVIS v. MAY.

ROLLS.—1815: 12th May.

Annual rents are not directed in the accounts against a mortgagee in possession from the middle of the time, but only from the beginning in a special case, or not at all.

THIS was a bill filed by the representatives of a mortgagor against the representatives of a mortgagee, praying a redemption. The mortgage was granted in 1793, and the principal sum advanced was 700*l*. From 1793 down to 1799 the mortgagee never received anything on account of either interest or principal; and at the latter period the mortgage debt, principal and simple interest, amounted to about 1,000*l*. In 1799 the mortga-

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1815.—Davis v. May.

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gee was let into the receipt of the rents. The rent which he received from that time down to 1809 considerably exceeded 35*l.* a year, the annual interest of the 700*l.*; and by application of those rents in keeping down the interest during that \*time annually running on the 700*l.*, and in paying off [\*239] the arrear of the interest which had before accrued, all interest down to 1809 was by the beginning of that year paid off, and the mortgage debt was therefore at that time reduced to about the original sum of 700*l.* From 1809 down to June, 1813, shortly after which time the defendant's answer was filed, the mortgagee first, and after his death the defendants, his representatives, continued in the receipt of the rents; and in each year during that time the rents they received were three or four times more than the annual interest of 700*l.* The defendants at the time of the hearing were still in possession.

A point was made as to the manner in which the accounts ought to be taken, and which came on upon an application to rectify the minutes of the decree.

Mr. *Leach* and Mr. *Lovat*, for the plaintiffs, insisted, that from 1809, at which time all arrear of interest had been paid off, the annual excess of the rents beyond the annual interest ought to be applied annually in sinking the principal, and that for that purpose the decree ought to direct the accounts from 1809 to be taken with annual rests; and *Robinson v. Cumming*(a) and *Gould v. Tancred*(b) were cited; and two cases from the register's book, *Forside v. Boyers*, June 20th, 1811, and *Kingston v. Roper*, Dec. 3d, 1811, were also mentioned.

Sir *Samuel Romilly* and Mr. *Bell*, for the defendants, insisted that the accounts ought not to be taken in that manner, but that the proper mode was to calculate simple interest on the 700*l.*, the original \*mortgage money from the date of the [\*240] mortgage, and ascertain the amount of all rents received,

(a) 2 Atk. 410.

(b) Ibid. 534.

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 1815.—*Macnamara v. Lord Whitworth*.
 

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and then deduct the total rents received from the amount of the principal mortgage money, and the interest so to be calculated on it. That an application having been made to the register, he had searched his books for three or four years past, and had found ten cases of decrees for taking the accounts of mortgagees in possession, only two out of which, *Forside v. Boyers* and *Kingston v. Roper*, which had been cited on the other side, had directed annual rests to be made; but that the other eight did not contain any such direction,<sup>(a)</sup> from which it seemed clear that it was not the usual course of the court to direct annual rests, unless the case is extraordinary, and where the mortgagor will be materially injured without it. That Mr. Croft, the register, upon being consulted, had also stated that it was not usual to direct annual rests, except under special circumstances.

The MASTER OF THE ROLLS said he thought his recollection of the form of decrees was the same. Either decrees make annual rests throughout, or not; there was no intermediate case. Here the special circumstances seemed to make the other way.

(a) The names and dates of the other eight cases were as follows: *Hall v. Callidge*, April 21st, 1812; *Bennett v. Kneebine*, April 27th, 1812; *Hansard v. Hardy*, Feb. 3d, 1812; *Elisha v. Elisha*, Feb. 14th, 1812; *Baker v. Rose*, July 2d, 1811, *Maddock v. Maddock*, July 4th, 1811; *Dighton v. Earl of Macclesfield*, March 30th, 1814; and *Morgan v. Lewis*, Nov. 29th, 1811.

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[\*241] \*MACNAMARA v. LORD WHITWORTH.

ROLLS.—1815: 12th May.

Devise of "all my said manors, lands, tenements and effects, real and personal," to one for life, and after his decease to his issue male and the heirs male of such sons successively one after another; with remainder to A., "and in default of his issue male *as before*" then over to B., "and in default of his issue male *as before*," then to the plaintiff. A. held entitled for life, with remainder to his first and other sons in tail male; B. to take in remainder in the same manner, and that the plaintiff was entitled to the ultimate remainder in fee.

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1815.—*Macnamara v. Lord Whitworth*.

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RICHARD WHITWORTH by his will duly executed, dated March 20th, 1808, devised and bequeathed as follows: "As I owe many debts to various persons, I am desirous and direct that they should be paid as soon as may be, and within a year after my decease. I give and bequeath all my estates real and personal, in the counties of Stafford and Salop, to Charles, Lord Whitworth, my cousin, late ambassador to the Courts of Russia, France, &c., and to Edmund Plowden, now of Hatton Grange in the county of Salop, Esq., trustees of this my will, in trust to them to preserve contingent remainders, that they do first or as soon as may be, direct to be paid off all my debts with any overplus of rents or sale of lands as hereafter mentioned, as they shall think proper after payment of interest due to Thomas Lloyd, Esq. I leave and bequeath all my manors, lands and tenements and effects, real and personal estate, to my trustees to sell parts of the said estates and effects as they shall think proper for the payments of my debts or some part of them; I then give and bequeath all my said manors, lands, tenements and effects, real and personal, to my cousin Charles, Lord Whitworth, late ambassador to the Courts of Russia and France for his life, and after his decease to the eldest son issue male of him the said Charles, Lord Whitworth, lawfully begotten, and the heirs male of the body of all and every such son or sons lawfully issuing, severally, successively and in remainder, one after another, as they and every of them shall be in seniority of age or priority of birth, the elder of such son and sons and the heirs male of his and their body and bodies lawfully issuing; and for the default of such \*issue then to Lord Aylmer [\*242] an officer in the army, and in default of his issue male as before, then to Philip Pauncefort son of the late George Pauncefort, my cousin by the female line; and in default of his issue male as before, then to Edmund Plowden, Esq., late or now of Hatton for his life only, and after his decease, then to John Macnamara, the second son of John Macnamara, Esq., of Langoed Castle, South Wales.

The bill was filed by the said John Macnamara claiming an

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1815.—*Maonamara v. Lord Whitworth.*

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estate in fee simple in remainder, after estates for life to Lord Whitworth, Lord Aylmer, and Philip Pauncefort, and their first and other sons in tail male, and the estate for life to Edmund Plowden.

The bill prayed that the will of the testator might be established, and that his debts might be paid out of his personal estate, or else by sale of a sufficient part of his real estate, and that the rights of the several parties interested under the said will might be ascertained and settled; and that the trustees might be directed to execute a conveyance of the said estates according to such rights.

The defendant, Lord Whitworth, by his answer claimed to be entitled under the said will to an estate tail in possession. The defendants Lord Aylmer and Philip Pauncefort also claimed estates tail in remainder.

Sir *Samuel Romilly* for the plaintiff.

Mr. *Leach* and Mr. *Shadwell* for Lord Whitworth, and Mr. *Bell* for Lord Aylmer, and Mr. *Richards* for Philip Pauncefort.

For the plaintiff it was contended that Lord Whitworth [\*248] took an estate for life with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail male, with remainder to Lord Aylmer for life, remainder to the same trustees to preserve contingent remainders to his first and other sons in tail male, with remainder in the same manner to Philip Pauncefort in strict settlement, with remainder to Edmund Plowden for life, with the ultimate remainder to the plaintiff in fee. The words after the limitation to Lord Aylmer "in default of such issue male as before," must be taken to mean in default of his having sons or of such sons having issue male, and the same interpretation must be put on the words "in default of such issue male as before" which follow the limitation to Philip Pauncefort. Though there

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1815.—*Macnamara v. Lord Whitworth*.

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are no words of inheritance in the devise to the plaintiff, yet the devise of all the testator's real and personal estates to his trustees, authorizing them to sell any part, and subject thereto his devising "all his said manors, messuages, lands, tenements and effects, real and personal," to the several persons therein named for estates for life, or estates tail, till he comes to the plaintiff, whose estate he does not describe, but leaves it upon the words just mentioned; those words are sufficient ground to create in him an estate in fee simple by implication.

For the defendants, it was contended that the words "as before" could not have the effect of devising the estates by implication in strict settlement to Lord Aylmer and Mr. Pauncefort. That the words "in default of issue male" gave them estates tail in succession. There were also not sufficient words upon the will to give more than an estate for life to the plaintiff.

The MASTER OF THE ROLLS was of opinion that the \*plain words of reference used by the testator, neces- [\*244] sarily introduced the same limitations as were contained in the prior part of his will. That Lord Whitworth therefore having the estate first devised to him for life, with remainder to his first and other sons in tail, that Lord Aylmer and Mr. Pauncefort also took in the same manner. He also thought that the plaintiff was entitled to the ultimate remainder in fee; for although the word "effects" would not alone be sufficient, yet the testator, in this case, had used other words sufficient to carry the inheritance, as "all his said manors, lands, tenements and effects, real and personal.

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1815.—*Martinius v Helmuth and Schmidt.*


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[\*245]      \*MARTINIUS *v.* HELMUTH AND SCHMIDT.

1815: 24th and 26th January.

Interpleader allowed by a factor against both defendants residing abroad, and one not appearing. The subject, a policy on a cargo lost, for effecting which the plaintiffs claimed to be reimbursed their expenses.

MR. HEALD moved on the part of the defendant Helmuth to dissolve the injunction which had been granted in this cause, to restrain the said defendant from proceeding in an action at law to recover the policy of insurance effected by the plaintiffs on a cargo of wheat per the ship *Hoffnung*, in the pleadings named.

The plaintiffs had various dealings in trade with Ludwig Arendt of Wismar, who had frequently consigned wheat to them as his factors. Arendt on the 15th August, 1814, wrote from Wismar to the plaintiffs, informing them of a shipment of wheat which he destined for them. Arendt also afterwards wrote another letter to the plaintiffs as follows: "22d August, 1814.—I confirm my last of the 15th instant, and inform you that you will have to expect from Messrs. J. F. Muller & Co., of Königsberg, a cargo of wheat of 60 to 65 lasts for my account, and probably a similar from Elbing, of which you may soon expect the bill of lading, according to my last. I intended consigning you a cargo from hence; but on further reflection I have declined it, as the quality is but middling, and would not fetch a good price in your market. This parcel goes to Liverpool." Instead of receiving the proposed consignment from Muller & Co. the plaintiffs received from the defendant Helmuth at Königsberg a letter as follows: "9th September, 1814. Commissioned by

Mr. Arendt of Wismar, I am about completing a cargo [\*246] wheat in order to send the same to \*you, in which of you will then have the goodness to effect the insurance for said friend, as I hear that the premiums are upon the rise. I wish you would rather beforehand cover about 60 to 65 lasts, value about 1,800*l.*, leaving the name of the ship and mas-



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1815.—*Martinus v. Helmuth and Schmidt.*

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ter to be filled up hereafter; for it will be a week before the bill of lading can be sent." Helmuth afterwards wrote to the plaintiffs the following letter: "20th September, 1814.—Already on the 9th instant I advised you of a shipment for account of Mr. Arendt, requesting you to effect insurance. This shipment would have taken place sooner if I could have met with a proper vessel, and had not been detained by the high demands of freight; but at last I have completed 45 lasts per Hoffnung, Schmidt. I enclose the bill of lading. The remaining 20 lasts will be shipped in the course of this week. On the other hand, I take the liberty to draw upon you for 1,000*l.*, which please to protect for account of Mr. Arendt; otherwise refer the drafts to Messrs. Bernoulli, and then deliver them the bill of lading. Captain Schmidt will sail out from Pillau this very day. I wait your reply." In pursuance of the said directions the plaintiffs effected the insurance required to the amount of 1,800*l.*, for which is due to them the sum of 129*l.* for premiums and charges, and they placed the same to the debit of Arendt. They afterwards wrote to Arendt and also to Helmuth, informing each of them of what they had done, and mentioning that they had declined the accepting the drafts, not having heard from Arendt. Helmuth, in an answer dated the 20th October, directed the plaintiffs to deliver the cargoes to Bernoulli, as having accepted his drafts. In consequence of this the plaintiffs delivered the bill of lading to Bernoulli, but retained the policy in their \*hands. Shortly [\*247] after they had so done, they received a letter apprising them of Arendt's insolvency, and desiring the plaintiffs to keep the cargo of wheat for the benefit of his estate. The ship and cargo were afterwards totally lost at sea.

The bill was filed in consequence of the adverse claims of Helmuth and Charles Frederick Schmidt, the assignee of the estate and effects of Arendt, to the policy of insurance which the plaintiffs still retained in their hands; and prayed that they might interplead, and the right to the said policy be ascertained; and for an injunction to restrain their suing the plaintiffs at law, offering, however, to deliver up the said policy to either of the

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1815.—*Martinus v. Helmuth and Schmidt*

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defendants who was entitled thereto, upon being repaid the 129*l*. advanced by the plaintiffs in effecting the same.

Schmidt had not appeared, and was resident abroad.

It was argued that the letter from Helmuth on which the policy had been effected, having advised the plaintiffs that bills would be drawn on them for the invoice amount of the cargo, was notice to them that the property would not pass to Arendt unless those bills were accepted; and consequently that the insurance was effected to cover the property of Helmuth only. The plaintiffs having refused to accept the bills, on which condition only they were to have the bills of lading, must be considered as holding the policy for the benefit of the party *bona fide* interested in the cargo. It was probable that Schmidt would never appear to the process of the court, and the injunction, therefore, would have the effect of keeping Helmuth out of his property forever.

[\*248]. \*Mr. Owen opposed the motion as premature, and contended that the cause must be brought to a hearing, or at least that the court would wait till the answer of the other defendant Schmidt was put in, who, as assignee of Arendt, appeared to have a strong claim. If Helmuth obtained the money, the plaintiffs might hereafter be sued by Arendt or his assignee for it.

The LORD CHANCELLOR said that he had already given his opinion in *Stevenson v. Anderson(a)* that a bill of interpleader would lie, although one of the parties who claimed the property was out of the jurisdiction, and might never come within it; and observed that he would enjoin forever afterwards a person who would not appear. His lordship was of opinion that in the present case the injunction should be continued, and that the plaintiffs should bring the policy into court to be deposited with the Master; that the defendant Helmuth should be at liberty to

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1815.—*Martinus v. Helmuth and Schmidt*

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bring actions and recover money due on the policy, and pay the same when recovered into court; and that the plaintiffs should be ordered to get in the answer of the defendant Schmidt with all due diligence, and in default of their doing so, that the defendant Helmuth should be at liberty to apply for the money recovered.

The order was made accordingly.



# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY,

IN

TRINITY TERM, 1815,(a)

IN THE FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III,

AND THE SITTINGS BEFORE AND AFTER IT.

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PIETERS v. THOMPSON.

Before the Vice-Chancellor sitting for the Lord Chancellor.—1815: 30th May.

Answer taken off the file, when the title omitted the words "to the bill of complaint of"

Mr. ROUPELL moved to take a certain parchment writing off the file, which had been filed as an answer, for irregularity. The objection was to the title, which was "the joint and several answer of Joseph Thompson the elder and Joseph Thompson the younger, defendants, Siedes Pieters and Gerben Pieters, complainants;" there being an omission of the words "to the bill of complaint of." \*The motion was made upon affidavit, the six clerk having declined to give any certificate, as he considered that it would have been taking upon himself to decide the question. *Griffiths v. Wood*,(b) was referred to, where an answer misnaming the plaintiff was considered as no answer,

(a) The Lord Chancellor was unable to sit during the whole of this term, being confined with the gout; but returned to court at the first seal after term.

(b) 11 Ves. 62.

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 1815.—*Platamone v. Staple*.
 

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and ordered to be taken off the file, by the description of a paper writing purporting to be an answer.

Mr. *Hayes* opposed the motion, upon the ground that as it clearly appeared by the title of the present answer who were the plaintiffs and who were the defendants in the cause, it was quite sufficient.

The VICE-CHANCELLOR ordered it to be taken off the file.<sup>(a)</sup>

(a) *Ex relations.*

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PLATAMONE v. STAPLE.

Before the Vice-Chancellor, sitting before the Lord Chancellor.—1815: 1st June.  
Injunction granted to restrain the defendant from suing for a rent charge granted, to qualify him to sit in Parliament, the purpose never having been answered.

THE bill in this case stated that John Johnstone deceased, in his lifetime, being in habits of intimacy with the defendant, made and executed a conveyance or assignment to him, dated Oct. 3d, 1812, whereby for a nominal consideration of ten shillings, but which in truth never was paid, Johnstone granted to the defendant, during his natural life, an annuity or rent charge of 840*l.* charged upon lands and hereditaments belonging to [\*251] Johnstone. The bill charged that \*the said conveyance was made to the defendant to answer some purpose of his own, but was never made use of, or applied to such purpose; and that the defendant was therefore bound to reconvey the same, as having been voluntary and without any consideration, and for an occasion for which it was not used. Johnstone was dead, having devised and bequeathed his real and personal estate to his sister, who had married plaintiff Platamone. The bill prayed a reconveyance of the said annuity or rent charge

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1815.—*Platamone v. Staple*

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of 840*l.* or for the defendant to deliver up or cancel the deed, and for an injunction to restrain him from proceeding under it by action, distress or otherwise.

The defendant, by his answer, stated that in September, 1812, being about to become a candidate for some borough at the general election, and not having a sufficient estate in lands to qualify him to sit in Parliament, he wrote to Johnstone and informed him of his purpose, and stated that a qualification would be necessary for him, and that Johnstone in answer thereto made and executed the deed of October 3d, 1812, in the bill mentioned. The defendant further stated that it was not afterwards necessary for him so to use it, but he believed that Johnstone executed the deed, not only to give defendant a qualification to sit in Parliament, but also with an intention to secure, in part, the performance of a promise which Johnstone had previously made, to provide for the defendant.

Sir *Samuel Romilly* and Mr. *Roupell* moved upon the answer, for the injunction prayed by the bill, and relied upon the above circumstances.

Mr. *Horne* and Mr. *Cross* opposed the motion, \*and [\*252] contended that the deed in question having been given in fraud of the Statute of Anne,<sup>(a)</sup> which was passed to secure the independence of Parliament, though it was never used for the purpose intended, yet being made and executed against a fundamental law of Parliament and public policy, there was no equity for the grantor or his representatives to have it afterwards delivered up; and they relied upon the case mentioned by Lord Eldon in *Curtis v. Perry*,<sup>(b)</sup> of a bill filed to have a reconveyance of a qualification given by the plaintiff to his son to enable him to sit in Parliament; the purpose being answered; as having been very properly dismissed by Lord Kenyon with costs. The defendant also swears to a promise of

(a) Stat. 9 Anne, c. 5.

(b) 6 Ves. 741.

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 1815.—*Platamone v. Staple*.
 

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Johnstone to provide for him, and that in expectation of it, he did not enforce the deed.

Sir *Samuel Romilly* in reply :—The case cited does not apply, the present defendant not having made use of it for the purpose intended. If the purpose had been answered, there are several other cases besides the one mentioned, against the right to a reconveyance. As to the defendant's expectation of being provided for by Johnstone, as being the reason for his not setting up the deed sooner, the case of *Alsager v. Rowley*<sup>(a)</sup> determined that where a party did not set up a demand in expectation of a bounty by will (that being the case of a solicitor who did not call for payment of a debt from some ladies), having [\*253] been disappointed in that expectation, he could not afterwards set it up.

The VICE-CHANCELLOR thought that this was not a case of the nature referred to by Lord Eldon in *Curtis v. Perry*, the defendant never having become a candidate for a seat in Parliament. In that event, therefore, it was to be restored, the purpose not being answered. There was no ground, therefore, against the plaintiff's equity upon the statute as a fraud upon the law, or as being against public policy. As to the further intention of gift by Johnstone to the defendant, it was only in the nature of conjecture by the defendant. The circumstances also did not quadrate with the supposition. The amount of the rent charge looked only like a purpose of giving a qualification, and any further intention not being evidenced in writing, showing the nature, extent, or terms of such provision; and the defendant never having called for the annuity till lately, there was sufficient doubt to make it proper to grant the injunction till the hearing of the cause.

The injunction was accordingly granted, but the defendant was ordered to pay the arrears of the annuity into court.

(a) Reported 6 Ves. 748, upon another point.



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1815.—*Duncan v. Duncan*,

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\*DUNCAN v. DUNCAN.

[\*254]

**ROLLS.**—1815: 30th May and 6th June.

Where husband and wife lived separate by mutual consent, and no evidence of any cruelty on the part of the husband; and he had before marriage settled part of her property upon her: the court refused to decree maintenance.

FRANCIS BURROWS by his will, after giving to his loving wife Elizabeth the sum of 80*l.* to put herself and all his children in mourning proceeded as follows:—

“Item, I give and bequeath unto John Sumner and Robert Stevenson, their executors and administrators, the sum of 400*l.* 4 per cent. bank annuities, and all sums of money I shall hereafter lay out in the public funds, upon trust, in the first place to permit and suffer my said wife Elizabeth to receive, take and enjoy the interest and dividends thereof, for and towards the maintenance of herself and all my children, as well those I had by my two former wives, as those I have or may have by my said present wife, until their respective ages of twenty-one years; and from and immediately after the death of my said wife Elizabeth, then upon this further trust, that my said trustees do and shall transfer such stock unto and amongst all my said children as shall be living at the death of my said wife at their respective ages of twenty-one years.

“Item, I give, devise and bequeath unto the said trustees and their heirs, all those my three freehold messuages or tenements with the appurtenances situate in Upper Shadwell, upon trust, in the first place to permit and suffer my said wife to receive and take the rents and profits thereof for her natural life for and towards the maintenance of herself and all my children; and I do declare my mind and will to be, that in case my said \*wife shall marry again, that then the interest of the [\*255] said stock and produce of my said estate shall not be paid to my said wife any longer, but that the same shall be ap-

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 1816.—*Duncan v. Duncan*.
 

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plied by my executors and trustees for the maintenance and education of such children as shall not have attained their respective ages of twenty-one years. All the residue and remainder of my estate and effects, I give, devise and bequeath unto my said loving wife, her executors, administrators and assigns forever." The sum of 500*l*. 4 per cent. annuities was left by the testator standing in his name at his decease.

The testator's widow after his decease, intermarried with the defendant Duncan; but afterwards separated from him, and they lived apart by mutual consent. The present bill was filed by her, by her next friend, against her said husband, charging that the separation was on account of the cruelty of her husband, and seeking that he might be compelled to make a settlement to her separate use of the property left by the testator, and praying a receiver of the real estate.

The defendant, by his answer, denied that the separation was on account of cruelty, and stated that upon his marriage with the plaintiff, a settlement was executed whereby 3,000*l*. part of the property to which the plaintiff was entitled in her own right, was settled upon her; but that the defendant had not made any provision for her out of his own property.

No evidence was entered into by the plaintiff or defendant as to the cause of their separation.

Sir *Samuel Romilly* and Mr. *Perry*, for the plaintiff, [\*256] contended that she was entitled under the \*circumstances to have the property in question secured to her. The settlement already executed by the defendant constituted no objection, being only of part of the wife's fortune, with nothing of his own. No case had determined that to be sufficient to make him a purchaser of the remainder of her property. Here she was entitled to a chose in action, being stock standing in the name of trustees. *Wright v. Morley*(a) and *Nicholls v. Danvers*(b) were referred to.

(a) 11 Ves. 12.

(b) 2 Vern. 671.

1815.—*Horne v. Barton.*

Mr. *Hart* and Mr. *Raibby*, for the defendant, argued that there was no case where the husband had made any settlement before marriage, in which the court had ever interfered on the behalf of the wife against the husband.

THE MASTER OF THE ROLLS :—If it were necessary to put a construction upon this will, I should be of opinion that the bequest to the wife was revoked in the body of the will, and not restored by the residuary clause. I think, however, that this bill cannot be sustained, being in fact a bill for separate maintenance. The facts are that the husband and wife do not live together; the cause of the separation does not appear. No provision for her is made by him in addition to the settlement. Now I do not find any instance in which upon such a state of facts the court has ever decreed separate maintenance to the wife, either out of the husband's property or out of the property of the wife. The cases in which the court has interfered are where the husband has been guilty of cruelty, turned the wife out of doors, or quitted the kingdom without making any provision for her. But \*where the case goes no further than that [\*257] they merely live separate and apart, I can find no authority for decreeing separate maintenance to her, still less for making any addition to what has been already settled on her.

Bill dismissed.

HORNE v. BARTON.

ROLLS.—1815: 30th May and 6th June.

A testator having devised his real estates, to be settled on his two daughters in equal proportions, *undivided*, for their lives; with remainder to their issue severally and respectively in tail general *with cross remainders over*: the court thought that the settlement should contain not only cross remainders as between the children of the two daughters, but also as between the two families.

THOMAS WOODROUFFE SMITH, by his will properly executed, devised real estates to trustees and their heirs, upon trust for the

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1815.—*Horne v. Barton.*

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use and benefit of all and every his children who should live to attain the age of 21 years or be married, which should first happen, in equal shares or proportions *undivided*, for and during their respective lives, with remainder to their issue severally and respectively in tail general, *with cross remainders over*; and he directed his trustees to make and execute a settlement of his said real estates accordingly.

It having been referred to the Master to settle the said real estates according to the will, between the testator's two daughters Anne Barton and Martha Woodrouffe Smith, the Master by his report stated that in settling the draft of the said deed, he had inserted therein cross remainders not only as between the several children of the said Anne Barton and the said Maria [\*258] \*Woodrouffe respectively, but also as between the two families of the said Anne Barton and the said Maria Woodrouffe, which he conceived to be according to the true intent and meaning of the said testator's will.

Exceptions having been taken to the said report, for that the Master ought not to have inserted in the said deed cross remainders between the two families, in the same manner as between the issue of the said daughters:

Mr. *Roupell* and Mr. *I. L. Williams*, in support of the exceptions, contended that according to the will the Master was not warranted in inserting cross remainders as between the families, but that the fee of each moiety of the estate in default of issue should be limited to each of the daughters, or that a general power of appointment thereof should be limited either by deed or will.

Mr. *Hart* and Mr. *Raithby*, for the report, contended that the cross remainders could not be confined to the issue, the testator having directed the estate to be undivided. The words of the will were comprehensive enough to embrace cross remainders as to the whole estate.

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1815.—Wilkinson v. Wilkinson.

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Mr. *Roupell*, in reply :—The testator has gone no further than to direct the limitation of estates tail. As to the term undivided used by the testator, its operation was only during the life estates of the daughters.

The MASTER OF THE ROLLS was of opinion that the Master had put the right construction upon the will. The testator \*had expressly directed cross remainders after the [\*259] limitation of the estate to the daughters and their issue severally and respectively in tail general. The exceptions, therefore, were overruled.

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WILKINSON v. WILKINSON.

ROLLS.—1815: 6th June.

Bankruptcy held not a forfeiture under a clause in a will against alienation.

UPON exceptions to the Master's report, the question was, whether the defendant, John Henry Wilkinson, had, by becoming bankrupt, charged and incumbered the life estate and provision by the testator's will, made to and for him during his life, so as not to be entitled to the personal receipt, use, and enjoyment thereof. The Master had reported that he was of opinion that the defendant Wilkinson by becoming bankrupt was not entitled.

The testator, Joshua Wilkinson, by his will, dated the 30th April, 1790, gave an annuity of 500*l.* to his wife, and also gave annuities of 50*l.* a year, to each of his daughters, and the remaining rents and profits of his leasehold premises to his son John Henry Wilkinson, and also a provision to his other son, William Wilkinson; and then followed this clause, "Provided always, and I do hereby declare, that the annuity of 500*l.* before given to my said dear wife for her life, and the provision I have made for my said daughters, Sarah Pearson and Elizabeth Cowdale,

1815.--Wilkinson v. Wilkinson.

for their respective use, during their respective lives as [\*260] \*aforesaid, and the estates given to my said sons for their lives, is and are upon this express condition, that in case they, my said wife, sons and daughters, shall respectively assign or dispose of, or otherwise charge or incumber the life estates, the annuities and provisions so made, to and for them during their respective lives as aforesaid; so as not to be entitled to the personal receipt, use and enjoyment thereof, then and from thenceforth the annuity or life estate, or interest of him, her, or their heirs respectively so doing, or attempting so to do, shall from thenceforth cease, determine and be void to all intents and purposes whatsoever, and shall immediately thereupon descend to, and devolve upon the person or persons who shall be next entitled thereto by virtue of the limitation aforesaid, in such manner as the same would have been done, in case he, she, or they was or were then respectively actually dead, anything herein contained to the contrary notwithstanding.

Mr. *Johnson*, in support of the exception, argued that the mere fact of the bankruptcy of the defendant was not in the contemplation of the court, as a fact to be sent to the Master; but even if it were, still the Master was wrong in his conclusion. These cases are always construed strictly according to the words of the limitation. This case was not to be distinguished from the cases upon leases, in which there is contained a clause restraining alienation, and upon which clause it has been determined that the taking the lease in execution is no forfeiture. *Doe dem. Mitchinsen v. Carter*.(a)

Sir *Samuel Romilly* and Mr. *Horne*, for the defendant [\*261] \*Wilkinson; Sir *Arthur Pigott*, Mr. *Hart* and Mr. *Bell* for other defendants, relied upon *Domett v. Bedford*,(b) as in point. *Shee v. Hale*(c) was also mentioned as a case in which a condition against alienation was held broken by taking the benefit of an insolvent act.

(a) 8 Term Rep. 57.

(b) 6 Term Rep. 684.

(c) 11 Ves. 404.

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 1815.—*Const v. Ebers.*


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**THE MASTER OF THE ROLLS:**—The question in this case is, whether the testator has expressed an intention of taking away the life estate which he had given to his son, upon the bankruptcy of that son. Now courts of law have held that an assignment by operation of law, which bankruptcy is, is not an alienation within the meaning of a restraint against alienation. If so, the testator's son in this case has not alienated, so as to forfeit his estate under the will. As to the testator having intended a personal enjoyment by his son only of this property, he probably did so; but he has not expressed himself in such a manner upon that subject, as that I am prepared to say his interest ceased by what has taken place. I shall think a little of it, and if I change my opinion shall intimate so.

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 CONST v. EBERS.

[\*262]

Before the Vice-Chancellor.—1815: 7th June.

Motion to commit upon a fourth insufficient answer refused, the plaintiff not having a report of the insufficiency of such fourth answer; though the defendant had filed a fifth answer.

**MR. JOHNSON** moved to commit the defendant for putting in a fourth insufficient answer. The application was founded upon Lord Clarendon's order,<sup>(a)</sup> by which a defendant may be committed, upon a fourth answer being certified insufficient. *Cloisworthy v. Mellish*<sup>(b)</sup> appears to have been the last case arising upon the order, in which, though a plea was held not to be an answer within the meaning of the rule, yet the practice itself was recognized. Here the plaintiff had not a report to the fourth answer being insufficient, but the defendant having put in a fifth answer was an admission from him of the insufficiency of the fourth answer, so as to render any report of it unnecessary.

(a) See Beames' Orders of the Court of Chancery, p. 188.

(b) 2 Ch. Cas. 279.

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1815.—*Const v. Ebers*.

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Sir *Samuel Romilly* and Mr. *J. Martin* opposed the motion upon an affidavit that the fifth answer had been accepted. Independent however of that, by the express terms of the order the fourth answer must be certified insufficient before the defendant can be committed. Any deficiency in the fourth answer has been supplied by the fifth, so that the plaintiff has now a full answer. But the fifth answer might have been put in to save expense, as is not unfrequently advised by counsel, who even think the preceding answer sufficient.

THE VICE-CHANCELLOR:—There was a subsequent [\*263] order in 1700(a) by which \*upon a third answer being certified insufficient, the plaintiff might apply to commit the defendant.

Sir *Samuel Romilly*:—The present application is not made upon that order; but if it were, it is quite clear that in this case the defendant has accepted the fourth answer.

Mr. *Johnson* in reply:—I admit that the application is made upon the first order, and that I was not aware of the second having been made. I deny that the fifth answer has been accepted. The intention of the order in requiring the report, is only to be informed of a fourth insufficient answer having been put in. All that is required is evidence of that fact. It does not signify how the court is so informed. The Master, if applied to for a report, must answer, that there was nothing to report, as the defendant himself has admitted the insufficiency of his fourth answer. It is quite immaterial in what manner that insufficiency appears.

The VICE-CHANCELLOR:—This application being to commit must be clearly brought within the terms of the rule, which are, that it may be made upon a fourth answer being *certified* insufficient. The present application is without such certificate. It is

(a) See Beames' Orders of the Court of Chancery, p. 317, 318.



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 1815.—Ray v. Ray.
 

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however said there is no necessity for any report in this case. That raises the question, whether the report is essential or not to proceeding under the order? Now there is no affidavit of the fifth answer not having been accepted. If it has not been accepted, I do not see any difficulty in getting the report. The plaintiff does not proceed upon the order of 1700, and the old order does not appear to have been ever enforced at all.

There may even be a doubt \*whether it can be pro- [\*264] ceeded under after the subsequent order of 1700. But without deciding that question, I think you cannot dispense with the certificate. The application is not within the letter of the order, and in a penal case I cannot dispense with the terms of the order.

The motion was refused with costs.

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 RAY v. RAY.

Before the Vice-Chancellor.—1815: 11th and 14th June.

After a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution the goods of a testator for the executor's own debt.

THE bill filed the 15th April, 1815, stated that Golding Ray being indebted to the plaintiff in 1,000*l.*, gave him his promissory note bearing date the 4th April, 1808, for the payment of that sum with interest. Golding Ray, by his will, appointed Mary Ray, his wife, and his son, the defendant Golding Ray the younger, executrix and executor of his will. They proved the will on the 10th March, 1809, and possessed themselves of sufficient personal estate to pay his debts and legacies, and also took possession of a leasehold farm which had been occupied by the testator; and the lease thereof expiring, they procured a renewal of the same to be granted to them in their own names. The widow afterwards died, appointing her son her executor. The promissory note for 1,000*l.* had never been paid. Johnson, one

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1815.—*Ray v. Ray.*

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of the defendants, was a creditor of the other defendant, [\*265] Golding Ray, but not of the testator, \*and had seized the said leasehold premises in execution for the said debt.

The defendant Johnson, by his answer, stated that he was a bond creditor for 700*l.* of the defendant Golding Ray. That the renewed lease was always treated and considered by Mary Ray and the defendant Golding Ray as their own absolute property. That the plaintiff never having required payment of the promissory note until about the time when the defendant caused the said effects to be taken in execution, he therefore submitted that it ought now to be presumed that the debt had been given up. The executors having also been permitted to enjoy and deal with the farm and the stock and effects thereon as their own absolute property, and the defendant Golding Ray having been since permitted to enjoy the same, in consequence whereof defendant Johnson and divers other persons, believing the same to be his own property, had been induced to advance money to him; he further submitted, that the plaintiff was not entitled to the assistance of the court to defeat his (the defendant's) endeavors to recover what was justly due to him by means of the said execution.

The plaintiff having obtained an injunction to restrain the sale of the leasehold property under the execution, the defendant now moved upon the coming in of his answer to dissolve the said injunction.

Sir *Samuel Romilly* and Mr. *Mathews* in support of the motion.

Mr. *Cooke* against it.

In support of the motion it was contended, that this [\*266] \*was an expedient to enable a debtor, who happened to be also an executor, to defraud his creditors. First, this court will not restrain the creditors of an executor from taking in execution the legal assets of the testator. Secondly, if it will,

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 1815.—Ray v. Ray.
 

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the court will not so interpose against what may be made assets in equity, if the creditors or legatees choose to make it so; for the lease is not at all events assets, because, if it prove a lease of no value, the creditors and legatees may reject it. Thirdly, under all the circumstances, however, of this case, the court will not interpose, seven years having elapsed since the debt was contracted, and even all the original testator's debts (except the plaintiff's) and legacies appearing to have been paid. *M'Leod v. Drummond*(a) was referred to.

Against the motion it was contended, upon the authority of *Farr v. Newman*,(b) first, that the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right; secondly, the renewed lease was in equity taken for the benefit of the testator's estate, and applicable to the payment of his debts, as in *James v. Dean*.(c)

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*June 14th.*—The VICE-CHANCELLOR having taken time to consider the case this day gave his judgment.

His Honor observed, that it was a case somewhat of \*novelty, and of considerable importance. It was a [\*267] question how far a creditor of a testator could, in equity, restrain a creditor of the executor from selling goods taken under an execution, which though not at law the assets of the testator, yet, it is argued, may in equity become his assets. Now, though the debt in this case existed in April, 1808, and the testator appears to have died soon afterwards, yet the present bill was not filed till the 5th April, 1815. It appears that all the debts of the testator were paid except the plaintiff's, and also all the legacies given by the testator's will. As to the principle upon which this bill is founded, that the goods of a testator in the hands of his executor cannot be seized in execution for a

(a) 17 Ves. 152.

(c) 11 Ves. 383.

(b) 4 Term Rep. 621.

1815.—Ray v. Ray.

debt due from the executor in his own right, and for which *Farr v. Newman* is relied upon, that must not be understood as an universal rule. In that case the creditor had notice, and knew the property to be the assets of the testator. Mr. Justice Buller also differed from the other judges in that case, and those other judges even distinguished and admitted that in some cases it might be done, as where all the debts were paid. In that case, too, the lapse of time was admitted by Lord Kenyon and Mr. Justice Ashhurst to be extremely material to be considered. In the case of *Whale v. Booth*,<sup>(a)</sup> Lord Mansfield observed, that the testator had died three years before the transaction in question, and if the executors paid all demands the assets belonged to them: no demand was made by the plaintiff during all that time; and long before any demand was made, a fair creditor of their own sued out execution. That case is recognized in *Farr v. Newman*, as to the importance of time, although the

[\*268] \*law laid down in *Whale v. Booth* is somewhat qualified in other respects. I think it also proper to advert in this case to an authority noticed by the judges in *Farr v. Newman*, I mean the case of *Aylesbury v. Harvey*,<sup>(b)</sup> where a replevin was brought for a silver cup, and the defendant justified by a condemnation before the justices of peace, and a warrant made by them to levy a fine of 20s. set on the plaintiff. The plaintiff replied that J. S. made him executor, and he had the cup, and yet has it as executor. The point adjudged was, that in that case the goods of the testator might be taken for the debt of the executor; and the reporter states at the end of the case that the court did not regard the plea, that he had it as executor so long ago; but they would intend the property altered notwithstanding the *adhuc habet*, for it would be very perilous if such pleading were allowed. That case is mentioned by all the judges in *Farr v. Newman* with perfect approbation. I have observed thus particularly upon these authorities, because, if the property in the present case had been legal assets, the plaintiff would have had all the difficulty arising from the lapse of time,

(a) Cited in the note to *Farr v. Newman*.

(b) 3 Lev. 204.

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1815.—Ray v. Ray.

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which is there so much mentioned. Here it is still greater, being between six and seven years. The plaintiff had forbore to make his claim when all the other debts were paid; when the legacies were afterwards paid; and when the lease was renewed in the executor's own name. The defendant swears he gave credit and advanced money upon the faith of its being the executor's own property. All this time the plaintiff lies by; and not until a creditor of the executor starts up, does the plaintiff ever make any claim. Even at law then it might be said \*to the plaintiff, you have induced the world to [\*269] believe that it was the executor's own property. Then upon what principle of equity is the court to interfere with the right at law? If the plaintiff had any right to consider the renewed lease as made for the benefit of the testator's estate, is it not fair to say that he has waived that right at this distance of time? The defendant has the law on his side, and at least an equal equity with the plaintiff, arising from the credit which he has been induced by the plaintiff to give, from being led by the plaintiff to consider the lease to be the executor's own property. I say he has at least an equal equity; and I ask if he has not even a superior equity? I cannot, therefore, see any ground for this court interfering with those rights of the defendant, after a lapse of six or seven years. It would be injurious to credit to do so, especially in the case of trades. But the present case has also in addition something of the appearance of being an endeavor on the part of one relation to interpose to protect another relation against a creditor's demands. I, therefore, upon the whole, think the injunction must be dissolved, that is, so far as it interferes with the sheriff's proceeding to sell, for the purpose of satisfying the defendant Johnson's debt.

The order was accordingly made.

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1815.—Brickwood v. Miller.

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\*BRICKWOOD v. MILLER.

1815: 24th June and 12th July.

Order, after several witnesses had been examined, to withdraw rejoinder and rejoin *de novo*, for the purpose of giving notice, under stat. 49 Geo. III, c. 121, s. 11, of the intention to dispute act of bankruptcy and petitioning creditor's debt: but upon the terms of undertaking to pay such costs as the court might afterwards direct.

THE plaintiffs were the assignees of Thomas Ibbot Pierce, a bankrupt, under a commission issued before the stat. 49 Geo. III, c. 121. The defendant Miller, by his answer, which was filed some time after the passing the act, stated that he did not know, and could not form any belief, as to the petitioning creditor's debt, or any act of bankruptcy; and, in the usual language, craved leave to refer the plaintiffs to such proof thereof as they should be able to make.

The cause being at issue, all Miller's witnesses having been examined, and some also of the plaintiffs' witnesses, and publication standing enlarged till the next seal, under an order for that purpose obtained by the plaintiffs; the defendant Miller, who had omitted to give the notice required by the 11th section of the act, of his intention to dispute the petitioning creditor's debt and an act of bankruptcy, now moved that he might be at liberty to withdraw his rejoinder, and rejoin *de novo*, for the purpose of giving the notice.

The motion was supported by an affidavit of Miller's solicitor, stating that the notice was omitted to be given merely through inadvertency, and that he verily believed it was essential to the justice of the case that Miller should be at liberty to put the assignees upon proof of the petitioning creditor's debt and an act of bankruptcy.

[\*271] \*Mr. Lovat, for the motion, cited *Berks v. Wigan*.<sup>(a)</sup> Sir S. Romilly against the motion.

(a) 1 Ves. and Beames, 221.

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1815.—*Sterling v. Thompson*

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The LORD CHANCELLOR made the order ; but upon the terms of the defendant Miller undertaking to pay all such costs as the court should afterwards think fit to direct, upon any application to be made to it, on behalf of the plaintiffs for that purpose.

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STERLING *v.* THOMPSON.

Before the Vice-Chancellor.—1815: 14th June.

Exceptions to a report may be taken off the file, if filed after the report has been confirmed absolute.

SIR SAMUEL ROMILLY moved to take exceptions to the Master's report off the file for irregularity, the exceptions having been filed after the report had been confirmed absolute.

Mr. *Girdlestone* opposed the motion, as being contrary to the practice of the court ever to take exceptions off the file after they had once got on. It was true the report had been confirmed absolute, but the opposite party did not know of it till after the exceptions were filed ; and this being a question of title to an estate, exceptions were the proper course to take the opinion of the court upon it. There was no instance of taking exceptions off the file, but they must be disposed of when the cause came on for further directions.

\*THE VICE-CHANCELLOR:—I should wish to have [\*272] some authority for saying that which is irregular cannot be undone. If none is produced, it seems to me that the proposition is self-destructive.

No authority being produced, the order was made.

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 1815.—Miller v. Eaton.
 

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## MILLER v. EATON.

ROLLS.—1815: 17th June.

Upon the construction of a will, the gift of the residue after a life interest to the testator's next of kin, held to mean next of kin at the death of the wife, and not those living at the testator's death; they having express bequests under the will.

THE question in this case was, whether upon the construction of the will and codicil of Francis Miller, the testator meant his next of kin, *living at his death*, to take vested interests in the residue subject to the contingencies therein mentioned, and which had happened? or whether he intended that his next of kin, who should be *living at the death of the tenant for life* who was entitled to the fund, were to have such residue?

The said testator, by his will, dated March 31st, 1777, bequeathed the residue of his personal estate upon trust among other things to raise the sum of 200*l.*, and pay the same to his son John; and he gave the interest of the residue of the said personal estate to the testator's widow for life; and after her decease, one moiety thereof to his eldest son Christopher, and the other moiety thereof to the said John, his youngest son.

[\*273] \*The testator afterwards made a codicil, dated April 11th, 1778, whereby he declared that in case his son Christopher should die in the lifetime of the testator's widow, and his son John should be then living, then he directed that his trustee should stand possessed of the moiety of his personal estate, so by his will directed to be paid to his son Christopher, in trust for his son John, and to pay the same to him when he should be entitled to the moiety given him by his will. And he declared that in case his son Christopher's wife should survive her husband, and the testator's son John should become entitled to the whole of the said residue, then he directed that John should pay to her for her life an annuity of 20*l.* But in case it should happen that Christopher and John should both die in the lifetime of the testator's wife he directed that after her decease the whole of



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1815.—*Miller v. Eaton.*

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the residue of his personal estate, after securing the annuity to Christopher's widow, should go to and be divided between and among all and every his (the said testator's) next of kin, in equal shares and proportions, share and share alike.

The testator left his widow, and Christopher and John, his only children, him surviving. Christopher Miller died leaving the plaintiff his widow, and having made a will in her favor; John Miller afterwards died, and then the testator's widow also died.

The plaintiff, as the executrix of Christopher, claimed a moiety of the residue in right of her said husband, as one of the next of kin of the testator Francis Miller living at his death. The defendants claimed under John the whole, as being the next of kin living at the death of the tenant for life.

\*Sir *Samuel Romilly* and Mr. *Roupell*, for the plaintiff, [\*274] contended that the next of kin living at the time of the testator's death were entitled. That as it did not appear either from any express words, or from the context of the will, or from both taken together, which description of next of kin the testator intended should take the residue; but as on the contrary the bequest was generally to his next of kin, without being confined to next of kin at any particular time; the words could only be understood and taken in their legal sense and acceptation; and according to their ordinary construction must signify next of kin living at the time of the testator's death.

The MASTER OF THE ROLLS, without hearing the counsel for the other side, determined that as the testator had given by express bequests to his sons who were his next of kin living at his death, that he must, therefore, when he used the terms next of kin, have meant his next of kin living at some other time than at his decease, because he had expressly provided for the persons who were his next of kin living at the time of his death.

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1815.—Smith v. Campbell.

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[\*275]

\*SMITH v. CAMPRELL.

ROLLS.—1815: 19th and 20th June.

Residue by will given "to my nearest surviving relations in my native country, Ireland," brothers and sisters living, held exclusively entitled against nephews and nieces: but sisters resident in America not excluded.

JOHN SMITH, surgeon of his Majesty's Ninety-fourth Regiment, by his will dated August 18th, 1807, he being at that time stationed in the East Indies, bequeathed the residue of his property as follows: "The remains of my property of every description to be sent home, as it may be realized, and equally distributed amongst my nearest surviving relations, in my native country, Ireland."

By the decree made in the cause, it was referred to the Master to inquire and state to the court who were the next of kin of the said testator at the time of his death, and also who were the said testator's nearest relations living at the time of his death in Ireland.

The Master, by his report, stated that the said testator had only one brother and four sisters living at the time of his death, namely the plaintiff Smith, and the defendants Elizabeth Fulton, Isabella Love, Jane Dickson and Mary Smith, and that the said Elizabeth Fulton and Isabella Love, were for several years prior to the death of the said testator, and still are residing in the United States of North America. That the testator had another brother who died in his lifetime, leaving four sons. That the defendant George Love, who resided in Ireland, claimed in right of his wife Isabella, to be entitled, although she was at the time of the testator's death residing in the United States of North America.

[\*276]

\*The case came on upon the petition of the plaintiff, of Jane Dickson, and of John Dickson, the personal re-

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1815.—*Smith v. Campbell*

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presentative of Mary Smith, who were the nearest relations residing in Ireland at the time of the testator's death, praying a division of the fund.

Mr. *Leach* and Mr. *Perkins* for the petitioners, contended that they were entitled to the exclusion of nephews and nieces, and also of the two sisters residing in America. Mr. *Hart* and Mr. *Trower* for the sisters in Ireland. Sir *Samuel Romilly* and Mr. *Parker* for the nephews and nieces.

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*June 20th.*—The MASTER OF THE ROLLS, after taking time to consider his judgment, said there were two questions in the case. First, as to the meaning of the words, "my nearest surviving relations." On the one hand, it was contended the testator's next of blood, on the other hand, that the next of kin were entitled according to the Statute of Distributions. The brother and sisters would be exclusively entitled in the one way of construing the words; nephews and nieces would share with them according to the other construction.

His Honor thought that there was no uncertainty whatsoever in the words "my nearest surviving relations" which the testator had used, but that they ascertained the testator's brother and sisters, who were living, in preference to his nephews and nieces, who were the children of his deceased brother. In *\*Edge v. Salisbury*,<sup>(a)</sup> the bequest was amongst the [\*277] nearest relations; but as the plaintiffs and defendants in that case happened to be related in the same degree to the testator, being his first cousins and nephews and nieces, it was therefore not necessary to consider whether brothers and sisters of the testator would have excluded nephews and nieces. Even if the testator in this case had made use of the words "his next of kin" instead of his "nearest surviving relations," yet if there had

(a) Ambl. 70.

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1815.—*Smith v. Campbell*.

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been nothing in the will to show that he meant the next of kin according to the Statute of Distributions, I should have thought the brothers and sisters would have been exclusively entitled. In the case of *Phillips v. Garth*(a) the contrary was however, decided by Mr. Justice Buller sitting for the Lord Chancellor. It was there held that next of kin comprehended nephews and nieces, as well as the testator's surviving brothers. That case indeed afterwards came before Lord Thurlow, but not on the above point. The inclination however of his lordship's opinion was so strong against Mr. Justice Buller's decision, that he directed the case to stand over, in order that the brothers might present a petition of rehearing. In *Garrick v. Lord Camden*,(b) Lord Eldon referring to Lord Thurlow's doubt upon the case before Mr. Justice Buller, states his own opinion as agreeing with Lord Thurlow's upon that decision. His Honor considered the present case as untouched by any former determination; and he was of opinion, that under the words nearest surviving relations the nephews and nieces had no claim.

Secondly, The next question was as to the meaning of the testator's words, "in my native country, Ireland." Do [\*278] \*they demonstrate the place in which his relations were to reside who should be entitled? Is there being so resident a condition which they must fulfil in order to take? or is the place of their residence immaterial? It seems to me that the testator only meant to designate the place where his relations were to be found. He desires that his fortune may be sent home. If he had stopped after using those words, there might have been a difficulty to know where he meant by the word "home," and he therefore adds, "in my native country, Ireland." He had left relations there, and he supposed them still remaining there. The words may be words of restriction, or of superadded description of the place where he thought his relations were living. I think they are only the latter. He does not put Ireland in contra-distinction to any other country. If a distinction of that

(a) 3 Bro. C. C. 64.

(b) 14 Ves. 372, 385.

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1815.—Wetherby v. Dixon.

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kind had been meant, it is probable that he would have expressed it. It is not very likely that he should have meant that only such of his relations who were domiciled in Ireland should take under his will, he himself having gone to seek his fortune in another country. I think, therefore, though there is an ambiguity in the expression, yet that he intended his sisters in America, as well as his brother and sisters in Ireland, were to take under his will. It is quite settled that an inaccurate super-added description of objects will not vitiate, if they are in all other respects correctly described.

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\*WETHERBY v. DIXON.

[\*279]

ROLLS.—1815: 19th and 20th June.

Legacy of 1,000*l.* not adeemed by a transfer by the testator of stock into his and legatees's joint names.

THOMAS NEATBY, by his will, dated the 7th of June, 1809, bequeathed to the plaintiff the principal sum of 1,000*l.*, then due and owing to him, the said testator, on mortgage of premises, in Nicholas Lane, Lombard street, from Samuel Scholey; provided nevertheless, and it was his will and mind, and he thereby directed that if the said sum of 1,000*l.* should happen to be paid to him, the said testator, before his decease, then that the said legatee thereinbefore directed to be paid out of the said sum which should or might be paid to the testator in his lifetime, should be paid such sum thereinbefore given to him out of the rest, residue and remainder of the testator's estate and effects thereafter given to Mrs. Ann Stubbs, the wife of Richard Stubbs.

The bill was filed by the plaintiff to be paid the said legacy. The defendants, who were the executors and residuary legatees, by their answer stated, that in the month of August, 1810, the mortgage money due from Samuel Scholey was paid off, and that the said Thomas Neatby paid the same into his banker's,

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 1815.—*Wetherby v. Dixon*.
 

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and that in the same month of August, the said testator purchased 700*l.* 3 per cent. reduced bank annuities, at the price of 69*l.* 1-4 per cent.; and that in the month of November, 1810, he purchased in his own name the sum of 1,300*l.* 3 per cent. reduced bank annuities, at the price of 65*l.* per cent.; and that in or about the month of July, 1811, he purchased in his own name a further sum of 400*l.* 3 per cent. reduced bank [\*280] annuities, at the price \*of 62*l.* 5-8 per cent., making with the said former sums of 700*l.* and 1,300*l.*, the sum of 2,400*l.* 3 per cent. reduced bank annuities; and that on the 5th August, 1811, he transferred the said sum of 2,400*l.* 3 per cent. reduced bank annuities, into the joint names of himself and the plaintiff.

The cause was heard upon bill and answer.

Mr. *Leach* and Mr. *Heys* for the plaintiff.

Sir *Samuel Romilly* and Mr. *Shadwell* for the defendant.

For the plaintiff it was argued, that he was entitled to the legacy of 1,000*l.*, although the mortgage had been paid off, and the transfer of stock made into the joint names of the testator and the plaintiff. The plaintiff stood in the situation of a common legatee, no relationship even appearing in evidence to have existed between the testator and him.

For the defendants it was argued, that the paying off the mortgage and subsequent transfer of the stock, was an ademption of the legacy of 1,000*l.* given by the will, and that the plaintiff could not be entitled to both. The plaintiff was, in fact, the testator's natural son. In *Trimmer v. Bayne*,<sup>(a)</sup> a legacy to a natural child was held satisfied by a portion.

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*June 20th.*—THE MASTER OF THE ROLLS:—It is admitted,

(v) 7 Ves. 503.

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 1815.—Wallace v. Glynn.
 

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that in general a man is entitled to the benefit of as many gifts as another chooses to bestow upon him, [\*281] and that a second is not a substitution of a first; but it is not so as to a debt. Judges in equity have thought a portion was in that respect like a debt. The rule, however, is confined to the case of a *legitime*. The donor must be a parent, or a person placing himself *in loco parentis*. It is impossible to refuse to assent to the distinction laid down by the Lord Chancellor, in *Ex parte Dubost*,<sup>(a)</sup> between legitimate and illegitimate children, in regard to the satisfaction of a legacy by a portion, although it gives the latter an advantage over the former. In the present case the testator has not recognized any relationship whatever subsisting between himself and the legatee. In consideration of law none existed. This is not the case of a parent, or of a person acting as a parent, or discharging parental duty towards the legatee. The legacy differs in nothing from one to a mere legatee. Now it has never been determined that a gift to a mere legatee is an ademption. Nothing therefore operates to prevent the plaintiff from claiming the legacy given by the will.

Decree for the plaintiff.

(a) 18 Ves. 140.

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\*WALLIS v. GLYNN.

[\*282]

1815: 11th May and 26th June.

Attachment not discharged though order for time had been obtained, service of a copy of the order not being good service, unless the production of the original is dispensed with by the opposite party.

A MOTION was made to discharge an attachment which had issued for want of an answer, upon the ground of an order for time to answer having been obtained by the defendant just before the attachment issued, and which time was not yet expired. It appeared by affidavit that the defendant had obtained an order for time, but that he had only served a copy of the order upon

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 1815.—*Adamson v. Armitage*.
 

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the plaintiff's clerk in court, without having produced the original. It was also stated that the copy was incorrect, purporting to be for a month's time to answer instead of six weeks, which had been obtained.

Sir *Samuel Romilly*, in support of the motion, contended that it was not usual in practice to show the original, and that the plaintiff's clerk in court ought to have sworn in his affidavit against the present motion, that he believed no such order was obtained.

Mr. *Hart*, against the motion, insisted that by the practice the original should be produced.

THE LORD CHANCELLOR :—I believe it is the practice to show the original order upon serving a copy, unless it is dispensed with.

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*June 26th*.—The motion having stood over in order that the defendant's solicitor might make an affidavit upon the [\*283] \*subject, such affidavit was afterwards filed; but the same not being satisfactory to the above point, the Lord Chancellor gave judgment upon the motion. His lordship stated that he understood that by the strict practice it was not enough to show the copy of an order; that in the present instance the solicitors on both sides seemed to have acted according to the strict practice, and therefore the attachment could not be touched.

The motion was refused.

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#### ADAMSON v. ARMITAGE.

ROLLS.—1815: 21st and 26th June.

A bequest of "the balance of my account with the interest thereon, to be vested by my executors in the hands of trustees whom they shall choose and name, the in-



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 1843.—*Adamson v. Arncliffe*.
 

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come arising therefrom to be for her sole use and benefit," is an absolute interest, and not a life estate merely. The prior gift of the fund is not limited by the subsequent mention of its produce, and the direction as to trustees is not restricted.

BENJAMIN HAY, by his will dated the 22d November, 1811, bequeathed as follows: "I give and bequeath unto my very trusty and valuable servant Lydia Adamson, the balance of my account in Mr. Downing's hands, with the interest thereon, to be vested by my executors in the hands of trustees whom they shall choose and name, the income arising therefrom to be for her own sole use and benefit."

On a bill filed by Lydia Adamson against the executors, for the purpose of being satisfied the above \*legacy, [\*284] a question was made whether the plaintiff was entitled to the above legacy absolutely, or only for her life.

Mr. *Hart* and Mr. *Horne* for the plaintiff, contended that she was entitled to the absolute property, and referred to *Elton v. Shephard*.(a) There was no disposition over of the legacy. The subsequent words do not abridge the effect of the prior ones, and the words "sole use and benefit" give it to her separate use, without any necessity for the word "separate" being used in the will.

Sir *Samuel Romilly* and Mr. *Heald* for the defendants. The income to arise from interest and dividends is only given to the legatee, and the direction in the will that the trustees should be appointed by the testator's executors would be otherwise of no use. There is nothing in *Elton v. Shephard* but the *dictum* of Sir Thomas Sewell, which at all applies to the present case.

Mr. *Hart* in reply mentioned a case of *Rawlins v. Carr*. The testator, by separating this fund and directing the appointment of trustees of it, shows that he did not mean that it should return again into his general personal estate.

(a) 1 Bro. 602.

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 1815.—*Ex parte Jackson.*


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THE MASTER OF THE ROLLS :—The proposition stated by Sir Thomas Sewell may not have been strictly necessary to the decision of the case, but it is conformable to the subsequent authority of *Philipps v. Chamberlain*.<sup>(a)</sup> Though it is otherwise with respect to real estate; yet in the case \*of personalty, words of qualification must be used to give a life estate only. *Prima facie* general words will give the whole interest in the latter, though only a life estate in the former. It is not necessary, however, here to call in aid that doctrine. The entire fund is here given, and therefore words would be necessary to reduce that. The testator gives “the balance of his account in Mr. Downing’s hands with the interest thereon,” and then comes a direction to vest it in trustees’ hands, and “the income to arise therefrom to be for her sole use and benefit.” Now although the gift of the produce merely would only carry a life interest, yet the prior gift is of the fund itself, and the direction as to trustees will not limit it. What the testator says relative to trustees is only directory and not restrictive; that is, the legatee is to enjoy it in that mode. I think also, the words “for her sole use and benefit” would vest the property exclusive of the marital right. There was a case mentioned in *Lumb v. Milnes*,<sup>(b)</sup> where Lord Alvanley held that a disposition to the wife for her *own* use must be intended for her separate use. I am clearly of opinion that the legatee is entitled to the absolute interest.

(a) 4 Ves. 51.

(b) 5 Ves. 517.

[\*286]

\*EX PARTE JACKSON.

1815: 27th and 29th June.

A bankrupt himself cannot be chosen the assignee of his own estate.

THE question in this case was, whether a bankrupt could be chosen the assignee of his own estate and effects?

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1815.—*Ex parte Jackson*.

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It was the petition of Henry Jackson, the bankrupt, who had been chosen such assignee, and sought of the court to have the choice confirmed.

An order had been made on the 2d March last, for discharging former assignees, and for directing the creditors to choose new ones. A meeting of the creditors had accordingly taken place on the 15th April last, when the bankrupt was chosen assignee without any opposition. He was stated to have passed his last examination, and to have received his certificate.

Sir *Samuel Romilly* contended that there was no objection upon general principles to such a choice, and that a bankrupt might be assignee of his own estate, just as well as a trustee or executor of another person's. There was even a precedent for it in a case before Lord Hardwicke,<sup>(a)</sup> on the 22d June, 1727, of Daniel Cowper, a bankrupt, who had not only been chosen assignee of his own estate, but had even signed his own certificate, and which the Lord Chancellor had approved of.

Mr. *Hart* and Mr. *Bell*, on the part of several creditors, \*objected to the choice, contending that the law [\*287] had divested the bankrupt's property out of him, and that there were also duties to be discharged by an assignee which the bankrupt could not discharge.

The LORD CHANCELLOR, upon looking at the case referred to, observed that the bankrupt had there signed the certificate as representative of his father, who was a creditor. His lordship said he would look into the records in the bankrupt office for the particulars of that case. The present case, however, was to be decided, not upon the right of the bankrupt being himself a creditor by representation, but on the rights of the other creditors. If anybody had asked whether in sending it to the creditors to choose new assignees, it was meant that the bankrupt

(a) *Greene's Bankrupt Law*, 260.

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1815.—*Ex parte Jackson*.

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should be chosen, his lordship would have answered that he had no such intention. It was a matter of absolute surprise to him to hear of such a thing taking place. The circumstance of having obtained the certificate made no difference. Creditors often think proper to give a bankrupt his certificate to obtain his testimony. But if he is to be the plaintiff in actions brought to recover the bankrupt's property, there is an end of his testimony.

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*June 29th.*—The next day his lordship sat, he stated that he had searched the books in the bankrupt's office, in which orders of dismissal of petitions, as this was stated to have been, were entered, but there was no trace of the case which had been cited. It might, however, have passed in court as far as the case was intelligible; for it was not to be supposed that Mr. Greene would have inserted it in his book without any authority. On [\*288] \*looking through the statutes and authorities, his lordship could not, however, bring himself to confirm the choice made of the bankrupt as assignee, if any other person could be found. Without, therefore, going through the particular grounds for his opinion, which, however, he said he would state, if any gentleman wished it, he thought there must be an order made for the creditors to proceed to a new choice.

His lordship afterwards added, that on looking at every step to be taken under the bankrupt laws, it was impossible not to see that the bankrupt could not be assignee. For instance, what was to become of the covenants entered into by him as assignee with the commissioners?

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1815.—*Wickham v. Wickham*.

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## WICKHAM v. WICKHAM.

Rolls.—1815: 4th July.

Tenant for life without impeachment of waste *other than wilful waste*, held entitled to the interest of money produced by sale of timber. Any claim of tenant for life to cut timber is a question at law only.

AUGUSTA ANN HATFIELD KAYE, by her will dated the 22d April, 1801, devised and appointed her real estates to the following uses; that is to say, "to the use of Mrs. Wickham Provost for her life without impeachment of waste further than wilful waste, and after her death to the use of the child of which she is now pregnant, in case it shall be a daughter, for her life without impeachment of waste, and after the death of the said \*daughter to the use of the first and every other son [\*289] severally and successively in tail male, and failing such issue, or if the child of which the said Mrs. Wickham Provost is now pregnant should prove a son, then I give the said lands and hereditaments to Bell Wickham Provost the younger for her life, without impeachment of waste other than wilful waste, and to her first and every other son severally and successively in tail male, and failing such issue to the use of Stevens Dineley Totton, his heirs and assigns forever."

The question was who was entitled under the above will to the purchase-money of timber fit to be cut upon the said estate, whether the tenants for life, or the owner of the first estate of inheritance?

Sir Arthur Pigott, Sir Samuel Romilly, Mr. Hart, Mr. Cook and Mr. Benyon, for the two different tenants for life, contended that upon the construction of the will they were entitled to every fair profit of the estate, doing no mischief, being in effect only impeachable for what is termed in equity, destruction, such as cutting young trees not fit to be cut. But at all events the tenants for life were entitled to the interest of the money produced

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 1815.—*Ex parte Brydges*.
 

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by the sale of the timber. *Powlett v. The Duchess of Bolton*(a) and *Tully v. Tully* there cited.

Mr. *Leach* and Mr. *Shadwell*, on the other hand, contended that the tenants for life were impeachable of waste other than permissive waste, there being no distinction between [\*290] voluntary and wilful waste. \*They relied upon *Bewick v. Whitfield*(b) as settling that the tenant for life was only entitled to have sufficient left for repairs, and an allowance for damage done on the ground, but not to have any allowance for the timber, which belongs to the first owner of the inheritance.

The MASTER OF THE ROLLS determined upon the authority of an unreported case of *Osborn v. Osborn* before Lord Eldon, that the tenants for life were entitled to the interest for their lives of the money produced by the sale of the timber. As to the right of the tenants for life to cut timber, his Honor seemed to consider that if they claimed any such right, it was a question at law only.

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#### EX PARTE BRYDGES.

1815: 13th July.

Costs of the committee of a lunatic trustee conveying within the statute must be paid out of the lunatic's estate.

THE Master in this case having reported that Fearnley, a lunatic, was a trustee within the meaning of the late act,(c) and the court having thereupon ordered his committee to convey, the application stood over till this day for the purpose of determining whether the committee should not have his costs.

Mr. *Temple* contended that the committee was entitled to his costs like any other trustee.

(a) 3 Ves. 374.

(c) 4 Geo. II, c. 10.

(b) 3 P. W. 268.

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1815.—Willan v. Willan.

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\*Sir Samuel Romilly opposed it.

[\*291]

The LORD CHANCELLOR determined that the estate of the *cestui que trust* must not bear the expense, but that it must be paid out of the lunatic's estate, and said that the rule was so.

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WILLAN v. WILLAN.

1815: 14th and 15th July.

After publication passed, before the hearing, witnesses cannot be examined in the Master's office as to any of the same facts, without special order. A petition was directed to be presented.

A MOTION was made on the part of the plaintiff that the Master to whom this cause stood referred might be directed to receive such evidence as the plaintiffs proposed to lay before him by the affidavits of competent witnesses sworn for that purpose, or to examine witnesses upon interrogatories before the said Master, in order to repel the claim of the said defendant in respect of improvements alleged to have been made by him on the farms and lands in question in the cause during his occupation thereof.

Depositions had been taken by the examiner before the hearing.

By the decree, the Master was, amongst other things, directed to inquire and state whether any and what lasting improvements had been made by the said defendant, or by any of his under-tenants upon any of the premises.

\*A state of facts had been carried in by the plaintiff, [\*292] and interrogatories left to be settled by the Master, but he had written underneath the draft interrogatories, as follows: "17th April, 1815. The depositions taken on the part of the defendants having been published by the examiner, and office

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 1815.—*Willan v. Willan*.
 

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copies thereof taken by the solicitor of the plaintiffs, I think I am not authorized to sanction an examination of witnesses on the part of the plaintiffs to the same matters; and if the plaintiffs are entitled now to examine witnesses, I apprehend the interrogatories are not to be settled by me without the special order of the court. I. S. HARVEY."

Mr. *Fonblanque*, Mr. *Hart* and Mr. *Trower*, were in support of the motion. *Parkinson v. Ingram*(a) was cited by them, and *Shepherd v. Collyer*, in 1744, there referred to.

Sir *Samuel Romilly* and Mr. *Leach*, opposed the motion.

THE LORD CHANCELLOR said, that after publication passed prior to a decree, and the depositions had been seen, it was quite clear that further witnesses could not be examined without leave of the court, which could not be obtained but with great difficulty, and that as to particular facts only.(b) But when a decree directs particular inquiries to be made, the court thereby in effect does give leave to examine witnesses as to the subject of the inquiries. The Master cannot, however, examine a witness who has been examined in chief without leave of the court.

[\*293] It was settled by Lord Hardwicke that the Master \*could re-examine a party in the cause without leave, but not a witness, because the decree was that he might examine parties as he should see fit, and he settles the interrogatories for the examination of the parties, but not for the examination of the witnesses. As the present case involves an important point of practice, I desire the register to furnish me with the register's book of the case of *Shepherd v. Collyer*; and if necessary I will call upon all the Masters to certify as to the point of practice.

July 15th.—This day his lordship mentioned that he had read the above case of *Shepherd v. Collyer* from the register's book, and which case goes to prove that the Master is right in the

(a) 3 Ves. 603.

(b) See *Purcell v. Macnamara*, 3 Ves. 324.



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1815.—*Peters v. Thompson*.

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objection he now makes. It appears there was a direction in that case for the Master to inquire as to the value of an estate; witnesses had been examined, and their evidence communicated to both parties; afterwards it was conceived that the evidence of another particular individual, being the tenant of the estate, was necessary to be had upon the subject of the value of the estate. A special application was made to examine that particular individual. As far as the case goes, therefore, it confirms the judgment of the Master that a special order is necessary.

The application stood over, his lordship directing that a petition should be presented, stating the particular circumstances of the case, with dates.

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\**PIETERS v. THOMPSON*.

[\*294]

1815: 14th July.

Plaintiff put to his election where suing in this court and in a foreign court of law.

SIR SAMUEL ROMILLY moved, that all further proceedings in this cause might be stayed, the plaintiffs having instituted proceedings in this honorable court and in one of the judiciary courts at Amsterdam for one and the same matter, and having since made their election to proceed in the said last-mentioned court; and that the plaintiffs might pay the costs of the proceedings here subsequent to their having so elected to proceed in the court at Amsterdam.

Mr. Agar opposed the motion.

The LORD CHANCELLOR directed that an affidavit should be produced, verifying a letter from the agent of the defendant at Amsterdam to the defendant here, mentioning the fact of the plaintiff having elected to proceed there.

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 1815.—*Ex parte Brown*.
 

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[\*295] \**EX PARTE BROWN, IN THE MATTER OF SIR  
JOHN NORRIS' CHARITY.*

1813: 31st January and 20th July.

Constructive trusts held not within the 52 Geo. III, c. 101, which gives relief upon petition in the case of charities.

THIS was originally a petition presented under the late act of Parliament,<sup>(a)</sup> by Zachariah Boulton, and several other persons; and it stated that Sir John Norris had, by an indenture bearing date January 10th, 1609, conveyed to certain trustees therein named, their heirs and assigns forever, all those little piddles and parcels of ground in the parish of Bray, in the county of Berks, whereon several cottages were then erected and built, containing by estimation five acres, which were therein mentioned to be lands assorted, or purpessures within the said parish, or the perambulation thereof; and also all manner of gardens, backsides, rents, and all other profits and appurtenances whatsoever thereunto belonging, in as beneficial a manner as the same were granted to him by certain letters patent therein mentioned, to hold the same to them, their heirs and assigns, upon certain charitable trusts therein mentioned. In the month of July, 1700, an inquisition was taken at Maidenhead, by virtue of a commission under the great seal of England for that purpose, by virtue of which the said commissioners ordered that the several persons therein mentioned to be in possession of the said cottages and lands, should forthwith quit the possession thereof unto the then surviving trustee of the same, and that new trustees should be appointed of the said charity estate. In the year 1723,

[\*296] \*the heir at law of the said surviving trustee conveyed the said charity estate to new trustees. In the year 1740, a bill by way of information was filed in the High Court of Chancery against the then occupiers of the said charity estate, to compel them to deliver up possession thereof; and that the

(a) 52 Geo. III, c. 101.

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1815.—Ex parte Brown.

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several occupiers of the said premises, or the greater part of them thereupon, without putting in any answer to the said bill, agreed by writing under their several hands to attorn tenants of the said premises to the then trustees thereof, and acknowledged by the same writing the said charity premises to be in their several occupations. The petition alleged that a particular description of such charity estates, so attorned to, is contained in a book signed by the then tenants of the said charity estates: that such book has ever since remained in the hands of the churchwardens of the said parish of Bray; and that the said charity estates have, by divers conveyances, become vested in the said petitioners Zachariah Boulton and several other persons, upon the trusts of the said charity. That through the negligence of the former trustees thereof since the year 1743, the said charity estates have come into the possession of persons not objects of the said charity; and that many of them refuse to acknowledge the right of the said charity, and claim the respective possessions as their own absolute inheritance; and that Brown and others dispute the claim of the said charity trustees, and pretend to hold the cottages, pieces of land and premises which are in their possession respectively, as their own absolute property, insisting that the same never belonged to the said charity; whereas it was insisted that the said several cottages, pieces of land and premises so in the possession of Brown and the other persons named in the petition, are parts of the premises granted by the said Sir John

\*Norris upon the charitable trusts aforesaid. The peti- [\*297]  
tion, therefore, of Boulton and the other trustees prayed  
that the said premises so severally occupied by Brown and others might be declared to belong to the said charity, and to be vested in the said trustees upon the trusts thereof; and that Brown and the other persons therein mentioned to be in the several occupations of the said premises, might be severally decreed and ordered to give and deliver up to the said trustees possession of the said premises so occupied by them respectively; and that they, together with other persons therein mentioned, might pay the costs of the said petition, which they were therein alleged to have rendered necessary by disputing the right of the said trus-

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1916.—*Ex parte Brown*.

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tees on behalf of the said charity to the said pieces of land in their possession respectively.

The said petition came on to be heard on the 28th day of February last, when the Lord Chancellor was pleased to order that the said petition should stand dismissed as against Lucy Hyde without costs; and as to the other parties, it was ordered that it should be referred to one of the Masters of the court to inquire whether the estates claimed by Brown and the others were the charity estates, and the consideration of all further directions, and of the costs of the said application as to the said other parties, was reserved until after the said Master should have made his report, with liberty to apply as there should be occasion.

Against this order, Brown and the several other persons whom it prejudiced, now presented a petition, praying that it might be discharged, and which last-mentioned petition now came on to be heard.

[\*298]     \**Mr. Hart* argued that the act of Parliament did not give the Court of Chancery jurisdiction upon petition, to make any order against a party claiming by adverse title to a charity; but that in such a case an information was the proper remedy. Your lordship decided this point in the case of *Dr. Williams' trust* some short time ago. The order which has been made in the present case, having been made in a summary way, is in that respect defective.

*Mr. Leach* in support of the order, relied upon the words of the statute, as expressly declaring that an order shall be final and conclusive, unless there shall be an appeal to the House of Lords within two years. The appeal, therefore, lies there. This order has been passed and entered by the proper officer. But the order is right, the court having jurisdiction by the express words of the act, "in every case of the breach of any trust, or supposed breach of any trust created for charitable pur-

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1815.—*Ex parte Brown*.

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poses, or wherever the order or direction of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes." Now, wherever lands are acquired belonging to a charity by any person, he becomes a trustee for that charity; unless he is a purchaser for a valuable consideration without notice. But the fact appears in this case that the party does not sustain that character.

Mr. *Hart* in reply:—It could never be meant by the legislature that an order obtained by surprise, for instance, could only be relieved by appeal to the House of Lords. This is like the jurisdiction in bankruptcy, in which the Chancellor may review his own judgments, though the bankrupt statutes give him no express authority so to do. \*In the next place, [\*299] the words of the act do not apply to constructive trustees, but only to actual trustees.

Sir *Samuel Romilly*, as *amicus curiæ*, begged to observe that a party taking lands as in this case, could not be deemed guilty of a breach of trust within the words of the statute, because he was not in fact a trustee till he took the assignment, even if he were afterwards. He further stated that the Vice-Chancellor had determined that he could not upon petition set aside a lease, or even an agreement for a lease of charity lands.

THE LORD CHANCELLOR:—As this is a question of considerable importance, I shall take time before I determine it, and also to consider whether an explanatory act is not required.

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*July 20th.*—This day his lordship stated that his opinion upon this case was, that constructive trusts were not within the meaning of the act.

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1815.—*Moorhouse v. De Passou*.

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\*MOORHOUSE *v.* DE PASSOU.

ROLLS.—1815: 18th July.

Cross-examining a witness in equity is no waiver of an objection, on the ground of interest, to the competency of such witness.

A QUESTION in this case arose upon reading evidence, whether an objection to the competency of a witness, upon the ground of interest, had not been waived by the opposite party having cross-examined such witness.

The defendant had examined the witness in chief; and the plaintiff, at the end of a string of interrogatories, put the question as to the interest of the witness. The witness admitted his being interested.

It was contended that a party after examining a witness, and finding that his evidence was unfavorable, could not then turn round and object to the competency of such witness.

THE MASTER OF THE ROLLS took some time to consider of the objection, and on the above-mentioned day, determined in favor of the objection to the evidence. He observed that the case of *Scott v. Fenwick*(a) was in point. His own industry had enabled him to find one other case also in point, namely, that of the corporation of *Sutton Colefield v. Wilson*.(b)

These two cases were, however, irreconcilable. Con-  
[\*301] sidering the question, then, upon principle, he \*thought the cross-examination was no waiver in equity. At law a witness was examined as to his interest upon the *voir dire*; but in equity the party intending to try the competency of a witness upon that ground had no opportunity of doing so. He could know nothing of his evidence till publication. The objection, therefore, could only be known after the examination had taken place.

(a) Gwill. 1250.

(b) 1 Vern. 254.

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1815.—*Gardner v. Marquis of Townshend.*

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GARDNER *v.* MARQUIS OF TOWNSHEND.

Rolls.—1815: 17th and 18th July.

A party entitled as equitable tenant in tail, under a settlement in which is a covenant to convey lands to the uses of such settlement; afterwards and upon his own marriage, covenants also to convey lands of less value: though he obtains a decree for the execution of the first mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed.

IN the year 1807, the defendant George Ferrars Townshend, Marquis Townshend, by his then description of the Right Honorable George Ferrars Townshend, Lord Chartley, eldest son and heir apparent of the Right Honorable George, Earl of Leicester, since deceased, which said George, Earl of Leicester, was the eldest son and heir apparent of the then George, Marquis Townshend, since deceased, upon his intended marriage, covenanted that he would well and sufficiently convey and assure, or cause or procure to be conveyed and assured, freehold manors, messuages, lands, tenements or other hereditaments of the clear yearly value of 4,000*l.*, to the uses in such settlement expressed.

The defendant was entitled, at the time of executing \*the above settlement, under the marriage settlement of [\*302] the said George, Marquis Townshend, to have real estate of the clear yearly value of 5,000*l.* conveyed, amongst other uses, to himself in remainder in tail. In 1808, being after his said marriage, the defendant filed his bill for the execution of the last mentioned covenant, and which was decreed in 1810.

The plaintiff filed the present, which was a supplemental bill, charging that the real estate of 5,000*l.*, which the defendant had by the said decree been declared entitled to have settled upon him, was the only property, which he had to answer or satisfy the covenant in his own marriage settlement, whereby he was bound to settle real estates of the value of 4,000*l.* per annum, for the benefit of his wife and children.

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 1815.—*Platts v. Button*.
 

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The bill prayed that the covenant to settle lands of 4,000*l.* per annum, might be declared a lien in equity upon the lands of 5,000*l.* per annum, decreed to be settled upon the defendant.

Mr. *Benyon*, for the plaintiff, referred to the authorities of *Deacon v. Smith*,<sup>(a)</sup> and the rule as laid down by Lord Talbot in *Lechmere v. Lechmere*<sup>(b)</sup> as establishing the principle, that where a party covenant to convey and settle lands and tenements to certain uses, and he afterwards purchases lands, but does not make any settlement of them pursuant to the articles and covenant, that the after-purchased lands shall be to the uses of the settlement. He contended that the present case came within that principle.

The MASTER OF THE ROLLS, without hearing the [\*308] \*other side, was of opinion that though a person who purchased lands, having entered in a prior covenant to convey and settle lands, might be presumed so to purchase in discharge of his covenant, yet that in the present case Lord Townshend could not be considered as in the light of a purchaser so liable, but was in fact entitled in equity to the lands in question at the time of his entering into the covenant; and that his afterwards getting a decree for an actual conveyance from the trustees could make no difference. He, therefore, thought that the present bill could not be sustained.

Bill dismissed.

(a) 3 Atk. 323.

(b) Cases Temp. Talbot, 93.

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#### PLATTS v. BUTTON.

1815: 27th July.

If the proprietor of a work gives permission to several to publish it, and then others copy it, he must bring his action before he can have an injunction to restrain the pirating his copyright.

A MOTION was made for an injunction to restrain the publishing or selling copies of the music of certain dances, specified in the bill, and notice of motion.



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 1815.—*Roe v. Gudgeon.*


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It appeared by the affidavits that one tune had been published seventeen years; others later; and one in 1814.

The defendants swore that the music having been published by other music sellers, they, the defendants, had copied the tunes, being ignorant that they were the property of the plaintiff.

\**Mr. Hart* and *Mr. Trollope* for the motion. [\*304]

*Sir Samuel Romilly*, against it, made another objection besides the publication above mentioned, namely, that there was no affidavit of title filed by the plaintiff till after the defendants had put in their answer, which had been held could not be done.

The LORD CHANCELLOR said, that the giving permission to some persons to publish, and then others copying, rendered it necessary for the plaintiff to bring his action at law before he could come for an injunction to this court.

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ROE v. GUDGEON.

1815: 24th July.

The court refused to order money to be paid into court, appearing upon books deposited in the Master's office.

UPON an application to compel the defendant to pay into court a balance, stated to appear upon certain books of account deposited by the defendant in the Master's office; it appeared that the plaintiff being an infant, had filed his bill for an account against the defendant, to whose answer exceptions had been taken for not setting out the account. The question of insufficiency for not setting out the account had been before the court upon exceptions to the Master's report. The defendant swore that his reason for not setting out the account was, that it was so voluminous that the stamps to the schedule would alone cost

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 1815.—Kerrison v. Sparrow and others.
 

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29,000*l*. The court thereupon had ordered the defendant to deposit the books \*of account in the Master's office, to be considered as part of the answer. Upon an examination of the said books, the plaintiff founded the above motion.

The LORD CHANCELLOR said the former practice was, to allow the plaintiff to move only upon the answer admitting a balance, to have the same paid into court. Afterwards the court permitted the motion to be made upon an examination. But this court will never try the items of an account; and in the case of *Mills v. Hanson*, it refused to order a sum to be paid in upon an accountant's view of the result of an account. The same objection existed in the present case as in that of *Mills v. Hanson*, and therefore the court could not order any balance appearing by the books in the Master's office to be paid into court.

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#### KERRISON v. SPARROW AND OTHERS.

1815: 26th and 27th July.

The court refused to entertain jurisdiction against commissioners of sewers, to restrain their removing a float or tumbling bay, upon a river; such removal being stated to be irreparable mischief.

THIS was an application to dissolve an injunction which had been obtained by the plaintiff, to restrain the defendants, who were commissioners of sewers, from removing a float or tumbling bay erected by the plaintiff upon the river Waveney.

The plaintiff being the sole proprietor of the navigation of the above river, and in 1808 the flood-gates or waster water-gates at one of the locks called Beccles lock having become decayed and rotten, he removed \*the same, and instead thereof put down a float or tumbling bay of the same height. The defendants having thereupon ordered a writ to be

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1815.—Kerrison v. Sparrow and others.

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directed to the sheriff for empannelling a jury as in the case of an obstruction, an inquisition was taken, and it was found thereby that the erection of the float was an impediment to the current, which occasioned its overflowing its banks; and that the plaintiff ought to abate and remove the same. The commissioners thereupon ordered the plaintiff to remove the said float before the 21st October, 1814, under the penalty of an hundred marks.

The bill charged, that if the float were to be removed, the water would be too low for the barges employed in the navigation, whereby the plaintiff would suffer irreparable injury, and it prayed a perpetual injunction against the defendants removing the said float.

Sir *Samuel Romilly* and Mr. *Wingfield*, in support of the motion, argued that the commissioners of sewers had no right to destroy the navigation of a river, and which would be attended with irreparable injury to the plaintiff's property. In such a case this court had jurisdiction to restrain them, as had been done by the Duchy Court of Lancaster, another court of equity, upon a bill filed for that purpose, in a case of *Hall v. Mason*, stated in Callis' Readings on Sewers, page 262.

Mr. *Hart* and Mr. *Trower*, against the motion, insisted that this court had no jurisdiction, and that the plaintiff's remedy was by *certiorari* to the King's Bench, and cited 4 Com. Digest, Title *Sewer. D*, page 464; 1 Sid. 73; 1 Salk. 145; 2 Bro. 336; 1 Vent. 78. By the stat. 23 Hen. VIII, c. 5, the commissioners appeared to be justices of record, with a court of their \*own [\*307] and great powers. The same appears from Callis' Readings, 129.

The LORD CHANCELLOR said, there seems to have been a defective verdict in the case of *Hall v. Mason*. He would take time to consider of the present case.

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*July 27th.*—This day his lordship said he could not restrain

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 1815.—*Edwards v. M'Leay and others.*


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the defendants. If, however, he changed his mind by the Monday following, he would mention it with his reasons; but if he did not mention it, the injunction must be considered as dissolved.

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*July 31st.*—His lordship this day again mentioned the case, and said that he had looked into the statute, commission, and all the cases, and thought the plaintiff had a shorter remedy in the case than by suit in this court.

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[\*308]      \*EDWARDS *v.* M'LEAY AND OTHERS.

ROLLA.—1815: 19th July.

The defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened or was threatened: a bill lies to set aside the conveyance, and for a return of the purchase-money, and all expenses.

In May, 1811, the defendants representing themselves to be seised or entitled in fee simple, or to have full power and authority to dispose of the fee simple and inheritance of a messuage, stables, coach-house, lands and hereditaments, at Clapham, contracted to sell the same to the plaintiff for 5,390*l.*; and by indentures of the 24th and 25th May, 1811, the same were conveyed to him. The plaintiff afterwards laid out a considerable sum of money in repairs upon the house and premises. Soon after the completion of the purchase, he discovered that part of the forecourt, and of the driving way or road leading up to the house; together with the whole of the ground upon which the coach-house and stables stood, had been formerly part of Clapham Common, and were in 1781, enclosed and taken from the common. The bill charged that the defendants were aware of the above circumstance, and not having disclosed the same to the plaintiff, were guilty of a gross fraud and imposition upon him,

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1815.—Edwards v. M'Leay and others.

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and that the plaintiff could not have discovered it from the abstract; and the bill therefore prayed that the contract might be declared void, and that the defendants might be compelled to repay to the plaintiff his purchase-money and what he had laid out on the premises with interest.

It appeared in evidence for the plaintiff, that the first enclosure of part of the common was in or about 1781, by Thornton, the then proprietor of the house. In 1808 Thornton sold to the defendants. By their \*answer they asserted, [\*309] that it was since the filing of the bill that they for the first time had heard that the ground on which the coach-house and stables stand did formerly constitute part of the common. But they admitted that at the time of making the agreement with the plaintiff, they had heard it rumored, in the parish of Clapham, that the piece of ground on which four houses, being no part of the said messuages and hereditaments sold to the plaintiff, were built, had been part of the said common.

It appeared that the ground upon which the four houses stood was adjoining to that part of the premises bought by the plaintiff, which had formerly been part of the common. When the defendants purchased, the whole was lying together in one plot; but they divided off the piece on which the four houses were built, selling the rest only to the plaintiff.

By the evidence of a witness of the name of Copeland, it appeared that in May and June, 1811, there were three vestry-meetings held at Clapham, that he was present, and that the meetings were for the purpose of entering into consideration respecting a claim made by the parish to the piece of waste or common on which the said four houses stood, and to the piece of waste or common on which the stable and coach-house stood; and that he attended at the desire of Malcolm and defendant Prescott, to let them know what passed at the said meetings, and that he learned that part of the driving way, and that the stable-yard and ground on which the coach-house and stables were built, had been origi-

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1815.—*Edwards v. M'Leay and others.*

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nally enclosed from Clapham Common. He communicated to Malcolm and Prescott, the claim of the parish to the said [\*310] land, and that the parishioners \*intended to perambulate the boundaries of the parish to ascertain and discover trespasses committed on the said common, by the said erections and enclosure, and by other enclosures. Malcolm and Prescott in reply, told the witness that the ground forming the stable-yard, part of the drive or carriageway, and on which the coach-house and stables, and the four houses are erected, and a field enclosed by a brick-wall to a house in the occupation of Mr. Franks, was once part of the said common; but that the same had been enclosed so many years the parish could do nothing with it, and that the same was as good a freehold as the other parts of the estate. The witness stated that he was present on Holy Thursday, 1811, when the boundaries of the parish were perambulated, and that the perambulators crossed or passed over, and on the outside of the coach-house and stables, and stable-yard, and part of the fore-court of the 'premises; in a few days afterwards he informed the defendant Prescott what the perambulators had done, who told him that they had done wrong by going over the walls and going through the stable-yard, and part of the front court of the premises.

On the part of the defendants, a witness of the name of Willshire stated that in 1811, he had a conversation with the plaintiff's father, who said that it was very much to be lamented that the defendants had erected the four houses, as they had certainly injured the house which he had bought for and on the part of the plaintiff; and also that he understood the same had given great umbrage to the people of Clapham, who said they were built on the waste. The witness was at the time of the conversation employed as a surveyor by the plaintiff, to pre- [\*311] pare \*plans of the said messuage and lands to be inserted in the plaintiff's deed of conveyance.

The case was argued by Mr. *Leach* and Mr. *Spranger* for the plaintiff, and by Mr. *Hart* and Mr. *Shadwell* for the defendants.

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1815.—*Edwards v. M'Leay and others.*

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It had stood a considerable time for judgment, and on the above day the Master of the Rolls gave a written judgment as follows :

"This is a bill of rather an unusual description. It is brought by the purchaser of an estate who has had a conveyance made to him, for the purpose of setting aside the sale and getting back his purchase-money, on the ground of an alleged misrepresentation with regard to the title to a part of such estate.

"It cannot certainly be contended that by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase-money. By the civil law it was otherwise. By our law a vendor is, in general, liable only to the extent of his covenants. But it has never been laid down, that on the subject of title there can be no such misrepresentation as will give the purchaser a right to claim a relief to which the covenants do not extend. In the case of *Urmston v. Pate* there was no ingredient of fraud. Both parties misapprehended the law. The vendor had no knowledge of any fact which he withheld from the purchaser. In the case of *Bree v. Holbech*,<sup>(a)</sup> it did not at all appear that the party knew that the mortgage which he assigned was a forgery. Lord Mansfield says, "if he had discovered \*the forgery, and had then got rid of the deed as a [\*312] true security, the case would have been different." And the plaintiff had leave to amend his replication, in case upon inquiry the facts would support a charge of fraud.

"Whether it would be a fraud to offer as good, a title which the vendor knows to be defective in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser. What then is the case made by this plaintiff? He states that the vendors represented themselves to be seised or entitled in fee simple, or to have full power and authority to dispose of the fee simple and

(a) Dougl. Rep. 630.

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inheritance of *the whole and every part of the premises* offered to him for sale without exception, as to any part whatsoever thereof; whereas, in truth, there was a considerable part of those premises to which the vendors had no title, or at least no other title than was derived from a possession from about the year 1781, of what had been a portion of the waste or common of the manor of Clapham. He asserts that the vendors knew that the part in question was an enclosure from the common—that they did not disclose the fact to him, and that he could not discover it from the abstract. He also asserts that this part of the purchased premises is material to the convenient enjoyment of the rest.

“The defendants admit that they did make such representation as is stated with respect to the whole of the premises—they say they do not believe that any of those premises ever did [\*313] compose part of the common; \*but supposing the fact to be otherwise, they deny that such fact was within their knowledge. They admit that no such fact appeared on the abstract, and they also admit the part in dispute to be material to the convenient enjoyment of the rest of the premises sold.

“The points then on which the parties are at issue are only these two. Was this at any time a part of the common? Was it known by the defendants so to have been? I say these are the only two points, because I do not find it asserted in the answer, that, supposing the ground in question to have been really taken from the common, the defendants have acquired, or have any means of making a good title to it.

“As to the first, I think it very fully proved, that down to about the year 1781, this piece of ground made a part of the common. Whether a little sooner or a little later, is not very material; but it seems sufficiently ascertained, that it was in that year that Mr. Thornton, the then owner of the house bought by the plaintiff, for the first time separated this spot from the rest of the common. According to the usual progress of an encroach-



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1815.—*Edwards v. M'Leay and others.*

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ment it was first enclosed with a slight fence, or low paling, a passage across it being left open; the fence or paling was afterwards raised; and finally the whole encroachment was surrounded with a brick wall. On the other side it is not attempted to be shown, that prior to the year 1781, this ground was in any way appurtenant to the adjoining house, or had been in the exclusive occupation of any person whatever.

"Then as to the second point, there is a considerable \*body of evidence, partly direct and partly circum- [\*314]stantial, tending to show that Mr. Prescott, one of the vendors, and who acted for the rest, must have known that this had been common, and had at different times been claimed by the parish as such. It appears that he was an inhabitant of the parish from the year 1787; that there was a parochial committee established in 1796, for the purpose of watching and guarding against encroachments on the common; that Mr. Prescott was an active member of such committee, and usually attended their meetings; that in the book kept of the proceedings of such committee, he is marked as present on the 1st June, 1801, on which day the following resolution is entered:—'Resolved, that it is the opinion of this committee, that the part of the common taken in by Mr. Thornton, from the house occupied by Mr. Collick to Acre Lane, be continued to the purchaser of his estate on his making application to the vestry for the same after the sale, on signing the book as an acknowledgment, and paying a shilling a year to the parish; the lord of the manor also signing his assent.' It is stated, that Mr. Prescott must have been at the meeting on that day; otherwise his name would not have been entered. But whether he was actually present when this resolution passed, nobody can at this distance of time distinctly recollect. It appears by the plan, and by the evidence, that the ground in question in this cause answers the description of that mentioned in the resolution as lying between the house then occupied by Mr. Collick (now by Mr. Franks) and Acre Lane. It further appears, that before the agreement with the plaintiff, some persons to whom the defendant had leased or sold that

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1815.—*Edwards v. M'Leay and others.*

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part of the ground enclosed from the common, which  
[\*315] lay nearest to the \*corner of Acre Lane, had begun to erect four houses thereon; that complaints had been addressed to Mr. Prescott by different persons on the subject of these erections, as being made on part of the common; and the defendants themselves admit in their answer, that they had heard it rumored in the parish that the piece of ground on which the four houses were built had been part of the common. If I rightly understand the evidence, it was by the defendants that the ground on which the four houses were built was first separated from the rest of the ground taken in from the common.

“It is further proved by a Mr. Copeland, that he was employed by Mr. Prescott and a Mr. Malcolm, another of the vendors (who is since dead), to attend some vestry meetings held in May and June, 1811, relative to this encroachment, in order that he might communicate to them (Prescott and Malcolm) what should pass at those meetings; and that he accordingly informed them that the parishioners claimed all the ground in question as being taken from the common, and that they intended to perambulate the boundaries of the parish to ascertain what trespasses had been committed on the common. He says, that on his making this communication, Malcolm and Prescott told him that all this ground had once been part of the common, but that the same had been enclosed so many years, the parish could do nothing with it. It appears that the parishioners did, on the 23d May, 1811, make their perambulation, and that Mr. Prescott inquired and was informed as to the course taken by the perambulators, which was such as to include the whole of the ground in question in what they claimed as common belonging to the parish.

What is the result of all this evidence? not indeed that  
[\*316] Mr. Prescott \*knew, of his own knowledge, that this had been part of the common, or that he had with his own eyes, seen the encroachment made, but that he had so much information on the subject as made it altogether improper and unfair to represent to a purchaser, as it is admitted he and the other vendors did, that they were seised or entitled in fee simple, or

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1815.—*Edwards v. M'Leay and others.*

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had full power and authority to dispose of the fee simple and inheritance of the whole and every part, without exception, of the premises which they offered to the plaintiff for sale. Be it that he entertained the opinion, which he and Mr. Malcolm expressed to Mr. Copeland, that after such a length of time the parish could not support the claim which they were then making; did he or could he believe that he and the other vendors had the same good and unexceptionable title to this spot, as against all the world, that they appeared to have had in the ancient part of the estate? And supposing some of the information to have been acquired, as perhaps it was after the representation had been made, was it fair to allow the purchaser to proceed to complete his contract on the faith of a representation which the vendors at the time of such completion knew to be substantially untrue? The suppressed facts, if disclosed, would at all events have influenced the price, even supposing the purchaser might have been willing to run a risk with regard to the title. It was contended at the bar that the plaintiff's father, who acted as his agent in the purchase, had notice, though not from the defendants, that this ground had been a part of the common. This is grounded on a passage in the evidence of a Mr. Willshire, who says that some time in or about the month of June, 1811, Thomas Edwards, the father of the plaintiff, in conversation with the \*deponent, said, that it "was very much to be [\*317] lamented that the defendants had erected the four houses at the corner of Acre Lane, as they had certainly injured the house he had bought; and also that he understood the same had given great umbrage to the people of Clapham, who said they were built on the waste." This, it is to be observed, relates entirely to the ground on which the four houses were built. It is a little extraordinary that the defendants, who contend that the rumor which they admit they had heard about this part of the ground being taken from the waste, excited in their minds no suspicion that the ground included in the plaintiff's purchase had ever made part of such waste, should yet insist that the very same degree of information possessed by the plaintiff's father, was to him full notice of a fact which they were unable to infer

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from such information. But it is still more extraordinary, when we consider the very different degrees of knowledge which the two parties possessed on the subject. The defendants, when they made their purchase, found the whole of the ground which is now proved to have been taken from the common, lying together in one plot. They divided off the piece on which the four houses were built. When they, therefore, heard it asserted that this piece had been taken from the common, they might reasonably enough doubt whether the whole was not in the same predicament.

“But a stranger, who never had seen the ground but in this divided state (which as far as appears was Mr. Edward's case), would have no reason to suspect that what was asserted with respect to one division must equally apply to another, from which it was apparently altogether distinct. Mr. Willshire admits he did not tell Mr. Edwards that this was a division recently made, or give him any information from which he could [\*318] collect \*that the assertion, if true as to one part, must equally apply to the whole.

“The only other objection which the defendants make to the relief sought by the bill is, that the plaintiff is premature in his application, inasmuch as he has not yet been evicted, and may perhaps never be evicted. But I apprehend that a court of equity has quite ground enough to act upon, and that it ought now to relieve the plaintiff from the consequences of the fraud practiced upon him. It may be true that the commoners are barred by having acquiesced for more than twenty years in the enclosure. But the lord will not be conclusively barred till sixty years shall have elapsed. I have already observed that the defendants do not pretend that there is any circumstance from which a title in them can be inferred, supposing the fact established that this made part of the common. Though the lord may never assert his right, is the plaintiff to be compelled to remain for twenty-five years longer in a state of uncertainty, whether on any day during that period he may not have the convenience of his habi-

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 1815.—Lord Dorchester v. Earl of Effingham.
 

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tation entirely destroyed? I apprehend the court is bound to relieve him from that state of hazard into which the misrepresentation of the defendants has brought him.

"There must, therefore, be a decree for setting aside the sale, and repaying the purchase-money with costs. The defendants must likewise pay to the plaintiff all the expenses he has been put to relative to the sale; and he must have an allowance for any money he laid out in repairs during the time he was in possession."

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\*LORD DORCHESTER v. EARL OF EFFINGHAM. [\*319]

Before the Vice-Chancellor.—1815: 1st and 4th August.

Widow held not to be put to her election by a devise to her for life of a mansion-house and fifty acres held with it, being part of the same estate out of which she claimed dower.

By settlement, dated 20th May, 1772, and made previous to the marriage of Lord Dorchester with one of the defendants, Maria Lady Dorchester, the portion or fortune to which the said Lady Dorchester was entitled, consisting of personal property, thereby directed to be invested in bank stock, was settled on the said Lord Dorchester for his life, afterwards to the said defendant Lady Dorchester, for her life; and after the death of the survivor of them for the benefit of their children, in the manner therein mentioned, without any reference as to the dower to which the defendant, Lady Dorchester, might become entitled out of the estates of the said Lord Dorchester in the event of her surviving his lordship.

In 1802, Lord Dorchester purchased the fee simple and inheritance of a messuage and premises in Up Nately, and also enclosures and other land thereto belonging, containing about thirty-three acres. And in 1804, Lord Dorchester also purchased the mansion called Stubbings, and the lands usually held therewith, containing about fifty-four acres, and also a messuage or farmhouse and lands in Bisham, containing about 229 acres.

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1815.—Lord Dorchester v. Earl of Effingham.

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Lord Dorchester, by his will, duly executed, dated 29th October, 1807, after bequeathing to the defendant, Lady Dorchester, a legacy of 500*l.*, desired that their \*marriage agreement might be fully complied with, and that the bank stock there alluded to be entirely at her disposal; and that she might have the interest and profits of the remainder of that stock for life, and after her death he left the said remainder to his executors in trust, to increase his landed property; and he desired that she might have Stubbings' house \*during her life, with the ground then in hand, about fifty-three acres; all the stock thereon alive and dead he gave her, and all the household furniture, with the linen, plate, clothes, books, manuscripts, maps and drawings; and the said testator directed that all his landed estates should be attached to his title as closely as possible; and all the timber, woods and trees, on his estates; and all his debts due from government; and his personal property not otherwise disposed of, he left to his executors in trust to increase his landed property.

Lord Dorchester died on the 7th May, 1808.

By the Master's report, made in pursuance of a decree directing the inquiry, he stated that as Lady Dorchester had no jointure settled upon her in lieu or bar of dower, he was of opinion that she was entitled to dower in or to the said messuage or tenement, barn, stable and yard, in Up Nately, and the several enclosures and land thereto belonging, containing about thirty-three acres; and he was of opinion that she was also entitled to dower out of the mansion-house and estate called Stubbings, which consists of about 283 acres of land, if she thinks fit to forego the benefit of the devise to her by her late husband of the said mansion-house and fifty-four acres of land, part of the said Stubbings estate.

[\*321] \*To this report Lady Dorchester took an exception; for that the Master ought, so far as regards the Stubbings estate, to have stated that she was entitled to dower out

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1815.—Lord Dorchester v. Earl of Effingham.

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of that estate, save and except as to the mansion-house and fifty-four acres of land, part thereof, devised to her for life by the will of her said late husband

Mr. *Courtenay* (in the absence of Mr. *Leach*, who was with him) was heard alone in argument, in support of the exception. He contended that the devise of part of the estate, namely, of the mansion-house, and the fifty-three acres of land held with it, to Lady Dorchester for life, could not have the effect of excluding her from dower out of the rest. Nothing was expressed upon or necessary to be inferred from the will against her taking both. Neither was the devise of Stubbings house and the fifty-three acres a gift upon any condition that she should not have her dower out of the rest of the estate. It was reducible to a question of intention upon which Lady Dorchester might claim the benefit of the devise and of her dower. The case of *Birmingham v. Kirwan*(a) was in its circumstances very like the present case, in which Lord Redesdale held that a wife was entitled to the benefit of a devise of a house and demesne for her life, paying a trifling rent, and was entitled to dower out of the residue of the estate, although the same were devised over. In *Strahan v. Sutton*(b) an annuity given to the widow was held by Lord Alvanley not to exclude her from dower; and that in order to compel a widow to elect to take under a will or dower, the two claims must be inconsistent with each other. There was no inconsistency in the present case in Lady Dorchester's taking under the will, \*and also her dower as [\*322] to the rest of the estate. The testator probably intended that she should occupy the mansion and grounds held with it, and also have a third of the rents.

Sir *Samuel Romilly* and Mr. *Trower* on the other side.

The rule is, that if it appears that the testator intended that his widow should take only a certain interest, then she must

(a) 2 Sch. and Lef. 444.

(b) 3 Ves. 249.

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 1815.—Lord Dorchester v. Earl of Effingham.
 

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elect; the only question, therefore, is whether the testator in this case intended that Lady Dorchester should take only a limited part of the estate, not her legal right in the whole? If the argument for the widow is well founded in this case, she must be entitled to dower, even out of the fifty-three acres, being part of one entire estate out of which she claims such right, which is absurd if she also claims such fifty-three acres under the will. It is inconsistent to claim her thirds of the 283 acres, and at the same time to claim the whole of the mansion-house and of fifty-three acres for her life. But it is to be collected that the testator did not so intend from the passage in his will, in which, after the devise to his widow of the fifty-three acres, he directs "that all his landed estates should be attached to his title as closely as possible." Those words clearly express an intention to exclude the widow from claiming dower. The widow cannot take against the will and under the will at the same time.

Mr. *Leach* in reply:—Nothing is better settled in the profession than that the widow's right to dower can only be excluded by plain expression or necessary implication. As to the first, there is none. As to the second, how can the enlarging [\*328] her interest in a part, by giving her an estate \*for life in it, be supposed to mean that she should not have dower in the general estate? In the absence of authority no such implication arises. But there are several cases directly in point, *Lawrence v. Lawrence*(a) and *Lemon v. Lemon*(b) and *Hitchen v. Hitchen*.(c) As to the point, that the gift here is of a part of one entire estate, there is too much refinement in it for the court to act upon. Every man's estate is his entire estate, and it can make no difference as to dower, whether he has it all by one title or by twenty different titles.

THE VICE-CHANCELLOR:—Out of respect to the Master, as well as to look into the cases, I will not entirely dismiss this case,

(a) 2 Vern. 365.

(c) Prec. in Chan. 133.

(b) 2 Eq. Cas. Abr. 353, Pl. 13.



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1815.—Lord Dorchester v. Earl of Effingham.

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but I will state my present opinion. It is clear that the will in this case does not express in terms that the widow is to be barred of dower. If she is then to be barred, the court must collect it by inference. A court must be cautious in doing this, it being dangerous to collect by guessing and conjecturing that a testator meant what he has not said. The testator in this case might not have been apprised of anything about dower when he sat down to give his wife the enjoyment of the house and grounds about it for her life. Probably he had no intention in any way as to dower out of the rest of his estate. Why should he be supposed desirous of excluding her from dower from any part of the Stubblings estate, and at the same time to have meant to leave the thirty-three acres open to her right of dower, which the plaintiffs admit that she is entitled to? The passage in his will, from which an intention is said to be collected of excluding her from dower, would equally exclude her [\*324] of the thirty-three acres as from the rest of the estate.

The intention collected from those words failing as to the thirty-three acres, upon what principle can it be applied to the other land? The argument derived from its being the same estate, is certainly ingenious; but in the case of *Birmingham v. Kirwan*, the Chancellor expressly puts the question, whether the implication extends to the rest of the estate, not to the rest of his estates; and he determined that it did not. It seems difficult to distinguish that case from the present; the widow there having a devise to her of part of an estate for her life, and the will disposing of the remainder of the same estate to another person for life. As to the words in the will about attaching the testator's land to his title as closely as possible, they create no inconsistency with the claim of dower. That claim may postpone or abridge such object in the testator, but it is not absolutely inconsistent and incompatible with it; and both object and claim may stand together.

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*August 4th.*—This day the VICE-CHANCELLOR said he had

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1815.—Case of the ship *Harmony*.

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looked into the authorities, and reconsidered his opinion, which he still retained, and therefore ordered the exception to be allowed.

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[\*325]     \*THE CASE OF THE SHIP HARMONY.

Before the VICE-CHANCELLOR.—1815: 26th and 27th July.

Prohibition to the Prize Court for proceeding after treaty of peace with America, refused.

THIS was a petition, praying that a writ of prohibition, returnable in the Court of King's Bench, might issue to the Right Honorable the Judge of the Admiralty Prize Court, to prohibit him from further proceeding, or holding plea before him in a suit by the American captors to be released from recapture of the ship or vessel called the *Harmony*.

The British ship *Harmony*, whereof George Norman was commander, with a cargo of wine and cork, British property, on board, sailed from Oporto for London, on the 26th of February, 1815, and in the prosecution of the said voyage was seized and taken as prize on the 2d of March following, in latitude 42° north, and longitude 12° west, off Cape Finisterre, by the American privateer *James Munroe*, David Williams commander. A few days after the capture, John Nelson, the mate, who alone of the former crew was left on board, formed a plan for recapturing the vessel, and on the 24th of the said month of March, in latitude 47° 47' north, and longitude 28° 13' west, cut down the prize master and wore ship for England, arriving at Falmouth on the 7th of April.

Proceedings were afterwards instituted in the Admiralty Prize Court by Nelson, as salvor of the tried ship; and a warrant was decreed in due form to arrest the said ship and cargo for salvage, on recapture from the enemy. By interlocutory decree

[\*326] of \*the said court, on the 6th of May, 1815, the said ship and cargo were condemned in such salvage; but

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1815.—Case of the ship *Harmony*.

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further decreed to be restored to Alexander Hutchisen, who claimed as owner of the ship, and to William Lynch, who claimed the cargo, on payment of their proportions of the salvage. This being afterwards paid, the ship and cargo were accordingly restored to them.

On the 26th of the said month of May, proceedings were instituted in the said Court of Admiralty, on behalf of the said American captors, claiming to be released from the recapture; whereupon a monition was decreed against Nelson and the owners of the ship and cargo, to show cause why the ship and cargo should not be released, because the recapture had been effected after the period specified in the late treaty of peace between Great Britain and the United States of America.

The said treaty of peace was ratified on the 17th of February, 1815. The London Gazette of the 14th of March, advertising the treaty, contained a proclamation, stating, that "in order to prevent all causes of complaint and dispute, with respect to prizes that might be taken after the space of twelve days from the ratifications of the treaty, it had been reciprocally agreed, that all vessels and effects which might be taken after the space of twelve days from the ratifications, upon all parts of the coasts of North America, from the latitude of twenty-three degrees north, to the latitude of fifty degrees north, and as far eastward in the Atlantic Ocean as the thirty-sixth degree of west longitude from the meridian of Greenwich, should be restored on each side; and that the time should be thirty \*days [\*327] in all other parts of the Atlantic Ocean, north of the equinoctial line or equator."

The British owners petitioned for the prohibition to stop the American captors from proceeding in the prize court in consequence of the recapture.

Mr. *Hart*, Dr. *Lushington* and Mr. *Heald*, in support of the prohibition, contended that the jurisdiction of the prize court,

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 1815.—Case of the ship *Harmony*.
 

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which he says, "in a question of prize, the common law court has no right to prohibit; to prove it, in 1 Sid. 320, it is said by the court, inasmuch as the matter there was "prize or no prize," no prohibition shall go; and in Carth. 476, 10 Will. 3, per Cur.,

"prize or ~~the~~ prize" is a matter not triable at common [\*330] law, but altogether appropriated to \*the jurisdiction of the Admiralty. The true reason why the jurisdiction is appropriated to the Admiralty is, that prizes are acquisitions *jure belli*; and *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country: nor had the counsel cited one instance where a prohibition was ever granted in a cause of prize." The sole jurisdiction, therefore, in matters of prize being the Admiralty Court, the only question here remaining is, whether the present case is a question of prize or no prize? Now there was not much dispute about the facts of this case. The ship was captured on the 2d of March, the treaty of peace being ratified on the 17th of February. By a legitimate act of warfare the belligerent American privateer possesses himself of the British ship; and it is for twenty-two days in his undoubted complete hostile possession. By a gallant enterprise the mate recaptures the ship, and brings it into a British port. The owners seek to dispute the right of the captors to the capture, which depends upon whether it was made within certain limits of time and place, or not. The captors say hostilities had not ceased at the time, and in the place of the capture; and they on the other hand dispute the legality of the recapture. These facts being controverted, what court is to determine such facts? Can a court of common law settle them? What principle but the *jus belli* can determine the question of law? Can the courts of common law act upon such principle? Where is the treaty of peace to be construed? Is the Court of Admiralty incompetent to advert to and construe it? Where a question is not between subject and subject, but between nation and nation, it must be determined according to the law of nations; and therefore the court familiar with that law must try it. Whether a ship is taken before twelve at night, with the other [\*331] circumstances of time and place, \*in what degree of lat-

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 1818.—Case of the ship *Harmony*.
 

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itude and longitude, in short all the *data* to lead to the conclusion of rightful or wrongful seizure, properly belong to the Admiralty Court. So, whether the right was perfected, the ship never having been brought *infra præsidia*, or condemned. If it is said that the original owner is remitted to his ancient right, and that the municipal law is to try it in an action of trover, and not the law of nations, I ask what authority or case is there for that assertion? Surely it cannot be said that a question of *jus belli* and the construction of a treaty can be tried in trover, because a question of property. The observation of Dr. Adams was very just, that in all questions of prize or no prize, resort should be had to that forum and code which all nations recognize, instead of to the municipal court where the prize is brought, and that in many treaties it was even recognized that it should be so. It was not an invidious preference of one court over another, to say that such question should be decided by a court recognizing the principles of the law of nations. The court which has issued the monition in the present case, does act upon those principles. If the original title of the captors was divested by perfected capture, their whole title stands on recapture, which must surely be tried *jure belli*. It is putting too narrow a construction upon the words of the commission, to say that they only give power to the prize court to adjudicate and condemn, until the treaty takes place. The capture and all its consequences must be tried in the prize court. The cases which have been mentioned show this, as *Turner v. Cave*, the cases of the *Mentor*, *Helena*, *Oceano*, *Adolphus Frederick* and *Hostage*. In truth, if the objection were well founded, it would go a great length, and oust the jurisdiction of the prize court in many cases. You cannot oust the jurisdiction, \*because [\*382] it may turn out that there has been an unlawful capture.

It is quite unnecessary to consider how long the prize jurisdiction must continue. In every war there must be a certain time for hostilities to cease, which are always continued *de facto* after they should have ceased *de jure*. There must also be a sort of twilight or continuance of prize jurisdiction, the same as

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1815.—Case of the ship *Harmony*.

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over acts *flagrante bello*. Captures must be made after every war, to be decided upon by some principle, and by some code of laws. It would be unfortunate if such cases must go to the municipal law. The authority in the 4 Inst., in my judgment does not touch the question; it does not even appear that any prize court then existed. There is nothing in the Prize Act assisting the question of jurisdiction. But upon the whole, I think the prohibition must be refused, unless I mention again to the contrary within a short time.

*July 29th.*—The VICE-CHANCELLOR, two days afterwards, mentioned the case again, to state that he continued of the same opinion.

Prohibition refused.

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**ENROLLMENT.**

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**INTEREST.**

1. Interest given on a note of hand from the time of its becoming payable. *Lithgow v. Lyon*, 29

2. Bonds, though they necessarily carry interest, given for instalments made up of principal and interest, being the consideration of a purchase or assignment of real and personal estate, are not usurious. *Turleton v. Backhouse*, 231

3. Annual rests are not directed in the accounts against a mortgagee in possession from the middle of the time, but only from the beginning in a special case, or not at all. *Davis v. May*, 238

**INTERPLEADER.**

1. Interpleader may be in favor of an insurance company against the landlord of premises which have been burnt down, but insured by him and the tenant of the premises, under an agreement for a lease, and claiming therefore a right to

have the money laid out in rebuilding the premises. *Paris v. Gilham*, 56

See PRACTICE, 5.

## JURISDICTION.

See AGREEMENT, 5. ANNUITY, 1, 2, 3.  
PRACTICE, 8. SEWERS.

## L LEGACY.

1. Legacy to the testator's "namesake Thomas, the second son of his brother John." John had no son of the name of Thomas, but his second son's name was William, who was held entitled. *Stockdale v. Bushby*, 229

2. Upon the construction of a will, the gift of the residue after a life interest to the testator's next of kin, held to mean next of kin at the death of the wife, and not those living at the testator's death; they having express bequests under the will. *Miller v. Eaton*, 272

3. Residue by will given "to my nearest surviving relations in my native country, Ireland," brothers and sisters living, held exclusively entitled against nephews and nieces: but sisters resident in America not excluded. *Smith v. Campbell*, 275

4. Legacy of 1,000*l.* not adeemed by transfer by testator of stock into his and legatee's joint names. *Wetherby v. Dixon*, 279

5. A bequest of the balance of my account with "the interest thereon, to be vested by my executors in the hands of trustees whom they shall choose and name, the income arising therefrom to be for her sole use and benefit," is an absolute interest, and not a life estate merely. The prior gift of the fund is not limited by the subsequent mention of its produce, and the direction as to trustees is not restrictive. *Adams v. Armistage*, 283

See PRACTICE, 13.

## LIEN.

A party entitled as equitable tenant in tail, under a settlement in which is a

covenant to convey lands to the uses of such settlement; afterwards and upon his own marriage, covenants also to convey lands of less value: though he obtains a decree for the execution of the first mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed. *Gardner v. The Marquis of Townshend*, 301

## LUNATIC.

1. Where a lunatic had been tried for murder and acquitted on account of his lunacy, but ordered by the judge to be detained, the Lord Chancellor declined ordering him to be removed out of jail to a proper receptacle for lunatics, the proper application being to the king in council. *Ex parte Hill*, 54

2. No costs upon liberty given to traverse an inquisition in lunacy. *Sherwood v. Sanderson*, 108

3. The residence is the proper place at which to execute a commission of lunacy. *Ex parte Baker*, 205

4. Costs of the committee of a lunatic trustee conveying within the statute, must be paid out of the lunatic's estate. *Ex parte Brydges*, 290

## MAINTENANCE.

1. Maintenance, under the circumstances, given to a father, who had 6,000*l.* a year of his own, and although no report of debts had been made. *Servoise v. Silk*, 52

2. Maintenance ordered, upon the fair inference of intention, where legacy was given to children "when" and "as" they attain twenty-one, with survivorship in case of any dying under that age, and if all die the legacy to cease. *Lambert v. Parker*, 143

3. Where husband and wife lived separate by mutual consent, and no evidence of any cruelty on the part of the husband, and he had before marriage settled part of her property upon her: the court refused to decree maintenance. *Duncan v. Duncan*, 254

## MATERIAL EXCEPTIONS.

See PRACTICE, 26.

## MISREPRESENTATION.

See AGREEMENT, 3, 5.

## MORTGAGE.

1. Bill to redeem after twenty years, upon parol evidence of conversation with the mortgagee, dismissed. *Whiting v. White*, 1

2. Mortgagor applying for time after having obtained the order under 7 Geo. II, c. 20, need not have his money ready, as at law. *Wakerell v. Delight*, 27

3. Tenant in common of a moiety having obtained a decree for redemption of his moiety, afterwards takes a conveyance of the equity of redemption of the other tenant in common, and then files a supplemental bill for a redemption as to that; stating that a prior conveyance of that equity of redemption by the assignees of that tenant in common, who had been a bankrupt, and in which conveyance the bankrupt had joined, was void as against the bankrupt, having been improperly made. Bill dismissed, being supported by the evidence of the bankrupt alone. *Wagh v. Land*, 129

4. Bill for the redemption of a mortgage after twenty years, upon the evidence of a conversation proved by one witness only, dismissed. His Honor, however, of opinion that parol evidence was admissible in such cases. *Reekes v. Poellehuwaite*, 161

5. Redemption refused though account delivered within twenty years, it being so delivered without any authority, by a receiver and manager of the estate, and the employer being in a state which rendered him incapable of managing his affairs. *Barron v. Martin*, 189

See INTEREST, 3. PLEADING, 3, 4, 5. PRACTICE, 1.

## N

## NEW TRIAL.

See PRACTICE, 14.

## P

## PAROL EVIDENCE.

See MORTGAGE, 1, 4.

## PETTY BAG.

See PRACTICE, 15, 23.

## PLEADING.

1. If the trustee of a term to secure the payment of an annuity assigns the term to a third person, such third person should be a party to a suit to have the securities delivered up, as void. *Bromley v. Holland*, 18

2. Information against a corporation, stating that they were seised of real estate partly for purposes of public utility, and other part in trust for private charity; and charging a general misapplication of the funds, and praying relief accordingly: a demurrer for multifariousness was allowed. *Attorney-General v. Corporation of Carmarthen*, 29

3. Plea of the Stat. 32 H. VIII, c. 9, s. 3, against buying and selling pretended titles; and also that there was *not any mortgage* as mentioned in the bill; to a bill that the defendant might redeem a mortgage, upon a covenant in a lease from the defendant to the plaintiff: held good, though a negative plea. *Hitchins v. Lander*, 34

4. Heir at law filing a bill to redeem a mortgage, having also brought in the claim of a third person to the heirship; if he himself is found upon an issue not heir, he cannot by supplemental bill have the benefit of the original suit, as the purchaser of the heirship in such third person. On demurrer to supplemental bill. *Tonkin v. Lethbridge*, 43

5. Plea (to a bill to redeem a mortgage) of a conveyance by the mortgagor of the equity of redemption, in trust to sell and pay the mortgage, and a bond debt from him and two other persons, and a conveyance from the trustee to the mortgagee, nobody offering at an auction so much as was due for the mortgage money with interest and costs: ordered to stand for an answer with liberty to except. *Stabback v. Leath*, 46

6. Deed of composition by creditors not

signed within the time stated in it, though void at law, yet if the creditors act under it, who have not signed it, it is good in equity. Plea of two creditors not having so signed it therefore held bad. *Spottiswood v. Stockdale*, 102

7. Dissenters may sue by information in the attorney-general's name, for charity estates belonging to them. *Attorney-General v. Lord Dudley*, 146

8. Equity cannot compel a resort to commissioners appointed under an act of Parliament to settle disputes between parties arising from a navigation: a lease for years having expired, and the landlord proceeding to recover possession. Demurrer allowed. *Stanhope v. Pilkington*, 193

9. Answer taken off the file, when the title omitted the words "to the bill of complaint of" *Peters v. Thompson*, 249

# POWER.

1. Power of appointment in a marriage settlement held to comprehend, as its objects, all the children of the marriage, and not to be confined to such of the children only as should be living at the death of the survivor of the parents. *Hougrave v. Currier*, 66

2. Direction to trustees to cut trees in aid of testator's real and personal estate, held not a trust, but a mere power, upon the whole of the will. *Gower v. Eyrre*, 156

# PRACTICE.

1. A receiver cannot be appointed without mortgagee's being before the court, if a mortgagee appears upon the face of pleadings. *Price v. Williams*, 81

2. Purchaser under a decree of the court is not entitled upon an affidavit that he has had his money lying ready for some time, to be let into possession of estate, and receipt of rents for all such time so passed. *Barker v. Harper*, 32

3. Vendor not making a good title, ordered to pay costs, though he was only a trustee to sell. *Edwards v. Harvey*, 40

4. Receiver ought not to be appointed where there is a trustee with power of entry and distress. *Buxton v. Monkhouse*, 41

5. The plaintiff in a bill of Interpleader is not entitled, after replying to the answers, to move for his costs, but must set down the cause for hearing. *Jones v. Gilham*, 49

6. Arrears of annuity ordered to be paid to widow and executrix, although no report of debts had been made, it being stated, by her answer, that there was no deficiency of assets. *Skinner v. Sweet*, 64

7. A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in court, in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety, and the same giving him therefore a lien on the money ordered to be paid to the receiver. *Glossop v. Harrison*, 61

8. Though the court will not restrain an action of trespass by a party through whose estate a canal is cutting for deviating from the line, because he has laid by and rested upon his legal rights; yet if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so, without a trial by jury in a disputed case, and directing an issue at law. *Agar v. Regent's Canal Company*, 77

9. A solicitor for one of the parties in a suit cannot become the solicitor for the opposite party, though he is separated from the partnership which jointly were so employed on the other side, and the remaining partner still continues so employed and the deed of dissolution stipulated that he should not act as solicitor for that party. On motion for an injunction to restrain such solicitor who had gone over from so acting. *Earl Cholmondeley v. Lord Clinton*, 80

10. Injunction granted in this court, though the court of law in which the action has been brought, have, upon an application made to it to stay proceedings, on a release of one of the plaintiffs, and affidavits of the circumstances of the case, refused to stay proceedings. *Whitfield v. Raife*, 89

11. Motion by one tenant in common who had agreed to sell to the other, that the latter should pay his purchase-money into court, refused; where such purchaser had been before and at the time of the purchase in possession of the whole, with

## MATERIAL EXCEPTIONS.

See PRACTICE, 26.

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- the approbation of the other tenant in common. *Freebody v. Perry*, 91
12. Exceptions to the Master's report, as to impertinence, is not cause against dissolving an injunction. *Corson v. Shirling*, 93
13. A residuary legatee has not such an interest as to prevent his becoming himself a purchaser of premises sold under a decree in the cause. *Hooper v. Goodwin*, 95
14. When the Court of Chancery directs an action to be tried at law, though it is with special directions, as that the bankruptcy of the defendant shall not be pleaded in bar, and that the parties shall be examined on oath, the application for a new trial must be to the court of law; but it is otherwise with an issue. *Ex parte Kensington*, 96
15. Order to set down demurrer in the Petty Bag for argument, made upon motion in court. *The King v. Knox*, 98
16. Private hearing always on the consent of both parties. *In the Matter of Lord Portsmouth*, 106
17. After order to elect to proceed at law or in equity, a receiver appointed by this court cannot distrain for rent, without undertaking to proceed in equity only. *Mills v. Fry*, 107
18. After order for time to answer, a demurrer may be taken off the file. *Dyson v. Benson*, 110
19. After enrollment of a decree, errors appearing upon the face of schedules permitted to be corrected upon motion without a bill of review; but the court would not permit an affidavit introducing a new fact to be used for that purpose. *Weston v. Haggerston*, 134
20. On the trial of an issue *devisavit vel non* directed by this court, all the witnesses to the will should be examined. *Booth v. Blundell*, 136
21. Motion against purchasers in the Master's office, to pay in their purchase-money, refused, the estate sold being copyhold limited for life, and then in remainder, and the remainder-man being abroad, he not having surrendered. *Noel v. Weston*, 138
22. Plaintiff not entitled upon paying the common costs of amendment, to change entirely the nature of his bill, as by converting a prayer for an account against a bailiff into a bill to foreclose a mortgage, after an issue against the plaintiff, finding him a mortgagee. *Smith v. Smith*, 141
23. After verdict in an action in the Petty Bag, an application to discharge the defendant for not having been charged in execution within two terms, must be made to the King's Bench; but the court to remove any difficulty made a collateral order. *Fraser v. Lloyd*, 187
24. Injunction granted upon bill filed and affidavit, to restrain proceedings in an arbitration, under the circumstances. *Myline v. Dickinson*, 195
25. Motion to bring into court the shares of prize-money belonging to claimants abroad who had not come in under the decree in this cause, refused. *Good v. Blewitt*, 197
26. Upon exceptions taken to an answer for insufficiency, the Master may look to the materiality of them, and overrule immaterial exceptions. *Agar v. The Regent's Canal Company*, 212
27. Defendant in contempt, and some exceptions allowed to his answer, and some overruled. If the plaintiff excepts to the Master's report as to the exceptions overruled, as well as the defendant to those which the Master has allowed, the defendant is entitled to a subpoena for a better answer, after the plaintiff's exceptions have been allowed by the court, and the defendant's disallowed. *Ibid.*, 221
28. A commission for the examination of witnesses abroad may issue before answer, where the suit is merely for a discovery and commission. *Noble v. Garland*, 222
29. Motion to commit upon a fourth insufficient answer refused, the plaintiff not having a report of the insufficiency of such fourth answer; though the defendant had filed a fifth answer. *Const v. Ebers*, 262
30. Order, after several witnesses had been examined, to withdraw rejoinder and rejoin *de novo*, for the purpose of giving notice, under Stat. 49 Geo. III. c. 121, s. 11, of the intention to dispute act of bankruptcy and petitioning creditor's debt: but upon the terms of undertaking



to pay such costs as the court might afterwards direct. *Brickwood v. Miller*, 270  
the purpose never having been answered. *Platamone v. Staple*, 250

31. Exceptions to a report may be taken off the file, if filed after the report has been confirmed absolute. *Sterling v. Thompson*, 271

32. Attachment not discharged, though order for time had been obtained. Service of a copy of the order not being good service, unless the production of the original is dispensed with by the opposite party. *Wallis v. Glynn*, 282

33. After publication passed, before the hearing, witnesses cannot be examined in the Master's office as to any of the same facts, without special order. A petition was directed to be presented. *Willan v. Willan*, 291

34. Plaintiff put to his election where suing in this court and in a foreign court of law. *Pieters v. Thompson*, 294

35. The court refused to order money to be paid into court, appearing upon books deposited in the Master's office. *Roe v. Gudgeon*, 304

PRIVATE ACT OF PARLIAMENT.

See AGREEMENT, 1.

PROHIBITION.

Prohibition to the prize court for proceeding after treaty of peace with America, refused. *Case of the Ship Harmony*, 325

PROMISSORY NOTE.

See INTEREST, 1.

PROPERTY TAX ACT.

The Property Tax Act, 46 Geo. III, c. 65, s. 112 and 116, in declaring covenants to pay the same void, has a retrospective operation: therefore covenants entered into before the act passed, are void. *Buzdon v. Monkhouse*, 41

Q

QUALIFICATION TO SIT IN PARLIAMENT.

Injunction granted to restrain the defendant from suing for a rent charge granted, to qualify him to sit in Parliament

R

RATEABLE CONTRIBUTION.

See ASSETS, 2.

RECEIVER.

See PRACTICE, 1, 7, 17.

REDEMPTION.

See MORTGAGE, 1, 3, 4, 5. PLEADING, 4, 5.

RESCINDING CONTRACTS.

See AGREEMENT, 2, 5.

RESIDUE.

See LEGACY, 2, 3.

REVOCATION.

See DEVISE, 3. WILL.

S

SERVICE.

See PRACTICE, 32.

SEWERS.

The court refused to entertain jurisdiction against commissioners of sewers, to restrain their removing a float or tumbling bay, upon a river; such removal being stated to be irreparable mischief. *Kerrison v. Sparrow and others*, 305

SOLICITOR.

See PRACTICE, 9.

STATUTES.

Statutes 38 Hen. VIII, c. 9, s. 3.

See PLEADING, 3.

Statute 7, Geo. II, c. 20.

See MORTGAGE, 2.

Statute 36 Geo. III, c. 90.

See EXECUTOR, 3.

Statute 46 Geo. III, c. 65.

See PROPERTY TAX ACT.

Statute 52 Geo. III, c. 101.

See CHARITY.

### SURETY.

See PRACTICE, 7.

### T

#### TENANT POUR AUTRE VIE.

*Quasi* tenant in tail of a freehold lease for lives may, by surrendering the old lease without the trustee's joining, and taking a new lease to himself, bar the remainders over; notwithstanding there were prior existing trusts at the time of such surrender. *Blake v. Lutton*, 178

### TIMBER.

See POWER, 2. WASTE, 1, 2.

### TRUST.

1. Power to lend trust money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond. *Langston v. Ollivant*, 33

2. Words of confidence, if the object be certain, and the subject ascertained, in equity always create a trust. *Wright v. Atkins*, 115

3. Purchase of trust property by trustees for their own benefit, set aside after a considerable lapse of time and several assignments. *Attorney-General v. Lord Dudley*, 146

4. Bill to set aside a purchase by a trustee for himself and his children; after a lapse of eighteen years, dismissed upon the length of time only. *Gregory v. Gregory*, 201

5. Where a term was created, and no trusts of it declared, but the estate devised to tenants for life with remainders over, the court decided that there was no resulting trust as to the term, but that it attended the inheritance. *Sidney v. Miller*, 206

6. Where a trustee refused to consent or object to a marriage, the court referred it to the Master to consider of the propriety of the marriage. *Goldmid v. Goldmid*, 225

See LUNATIC, 4.

### U

#### USURY.

See INTEREST, 2.

### W

#### WASTE.

1. Tenant for life entitled to timber for repairs cannot sell the same to reimburse herself expenses incurred in repairs. *Gower v. Eyre*, 156

2. Tenant for life without impeachment of waste, other than wilful waste, held entitled to the interest of money produced by sale of timber. Any claim of tenant for life to cut timber, a question at law only. *Wickham v. Wickham*, 288

#### WIDOW.

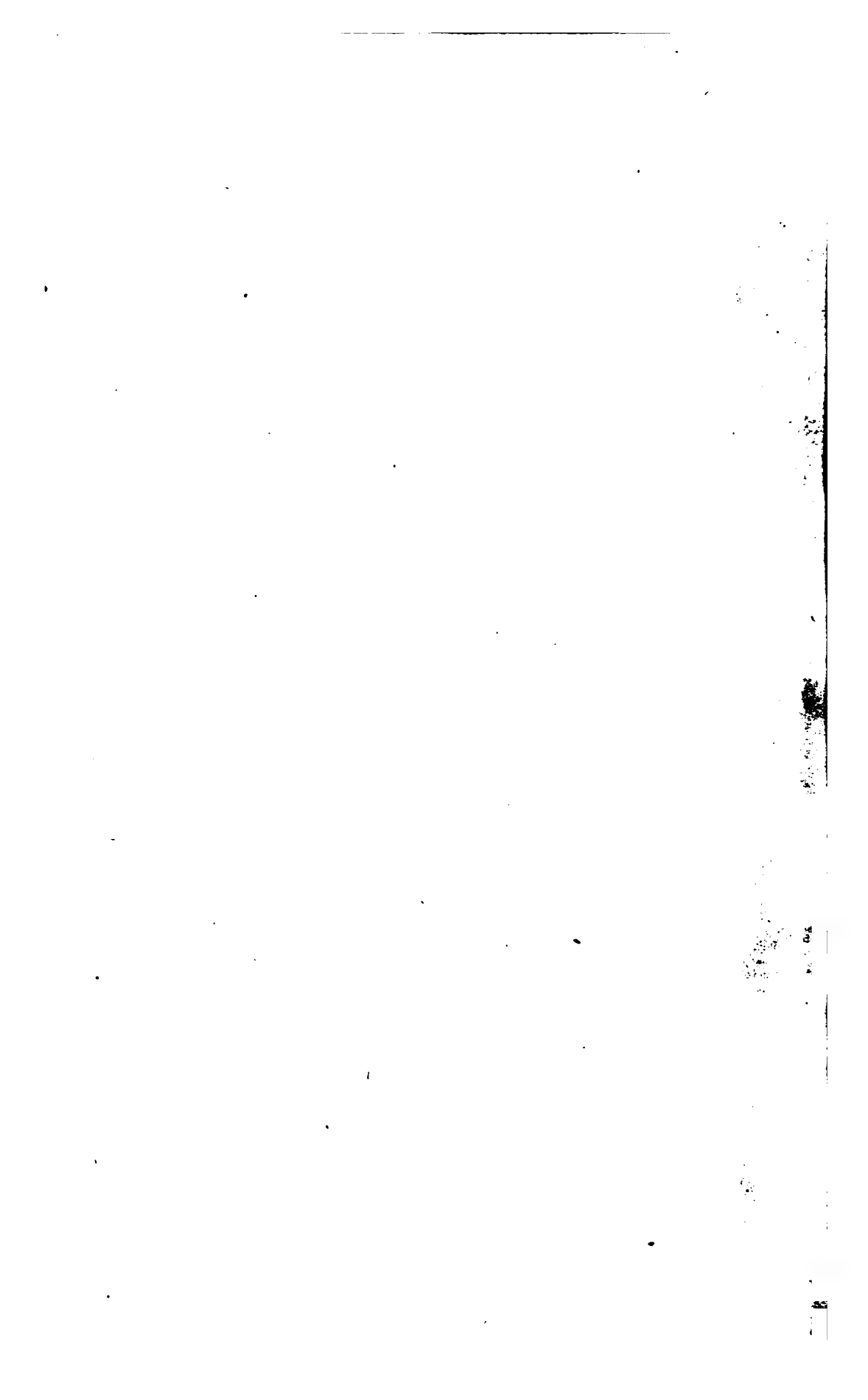
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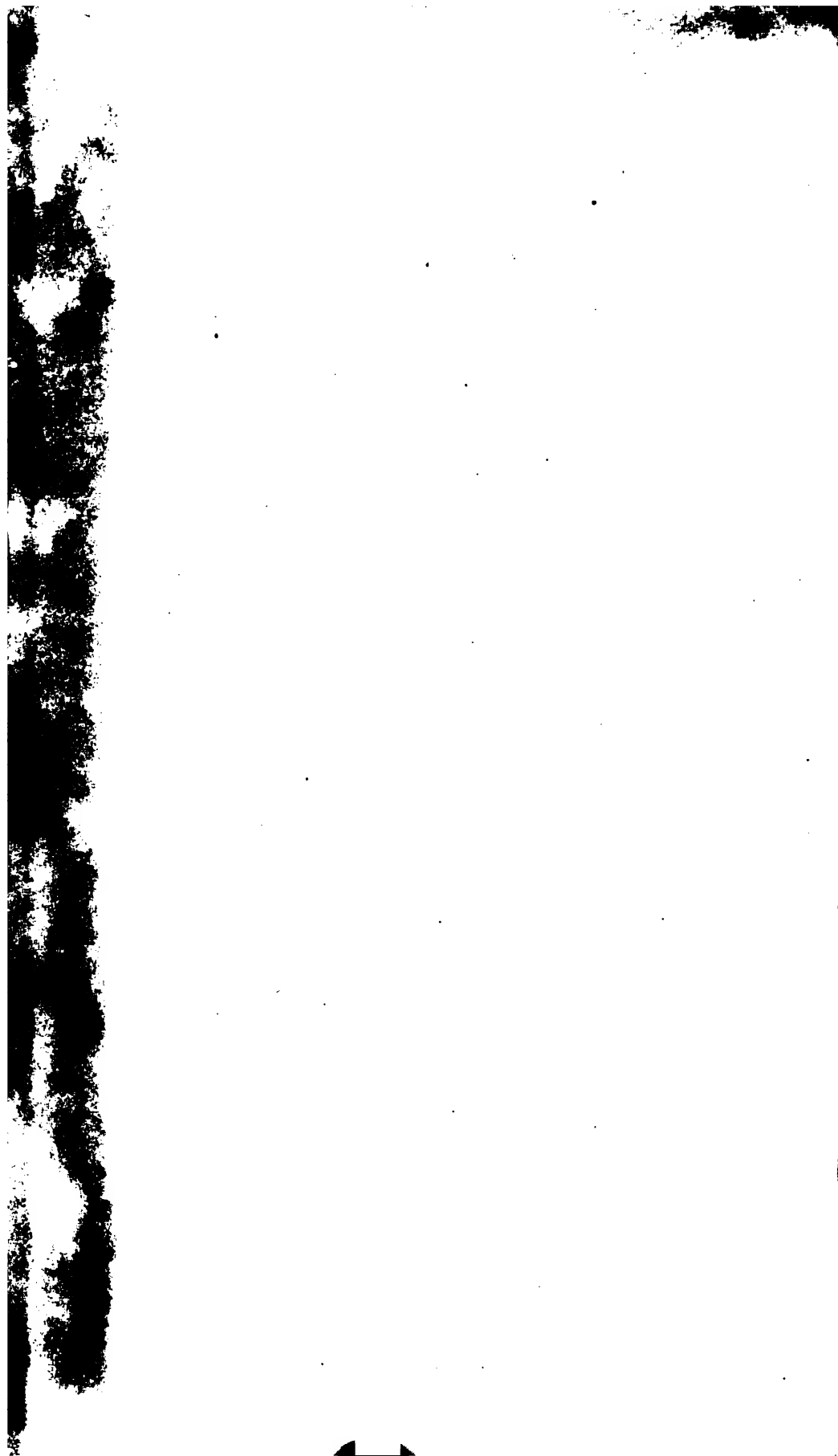
### WILL.

Where a testator interlined his will to except the plaintiff, who was named a legatee under it with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil without doing the same with the interlineation of the will, the court admitted the plaintiff to an equal interest with the other parties taking under the will, considering the inference as certain that the testator so intended. *Utterson v. Utterson*, 60

#### WITNESSES.

See PRACTICE, 20, 28, 38.

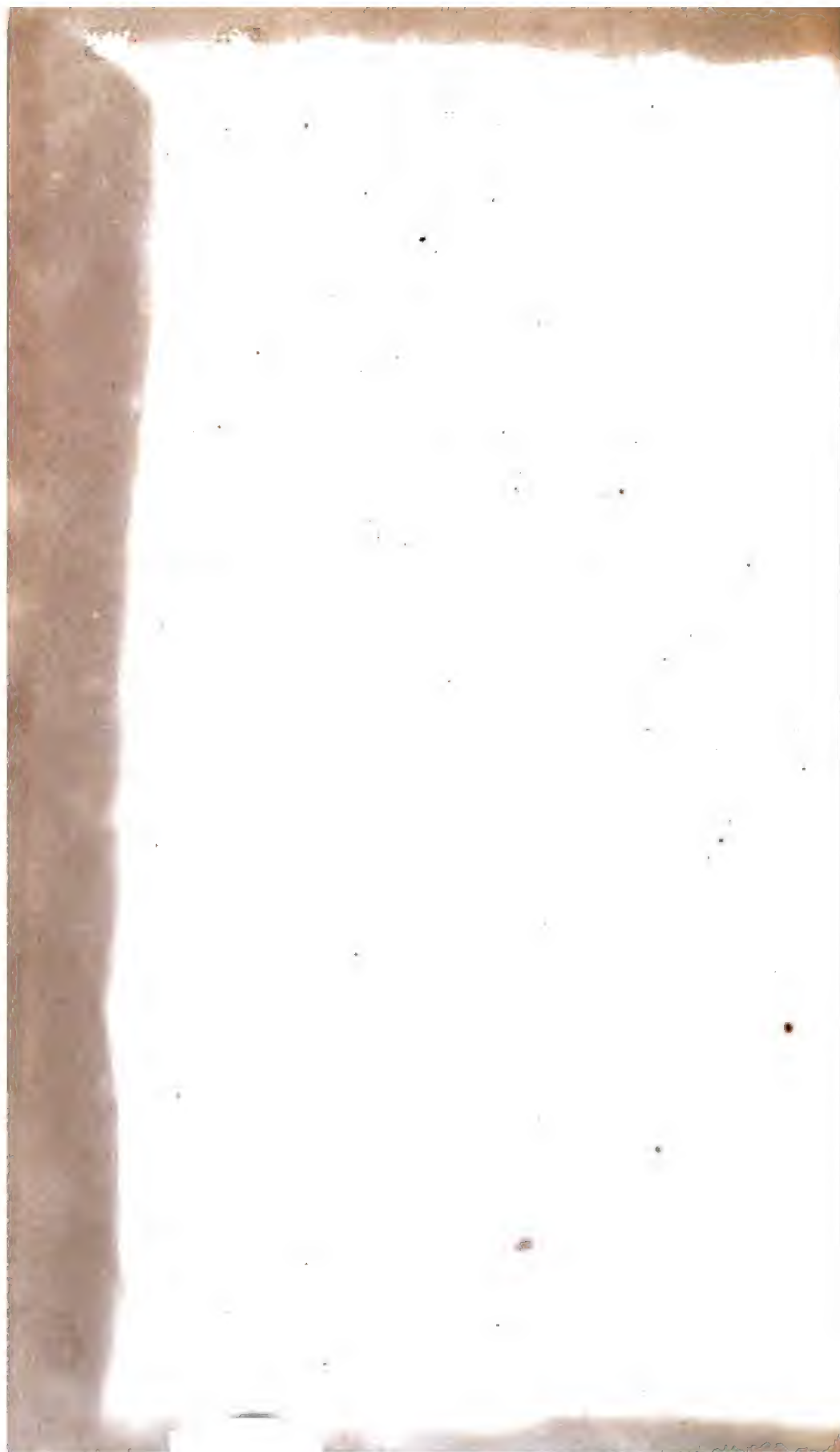






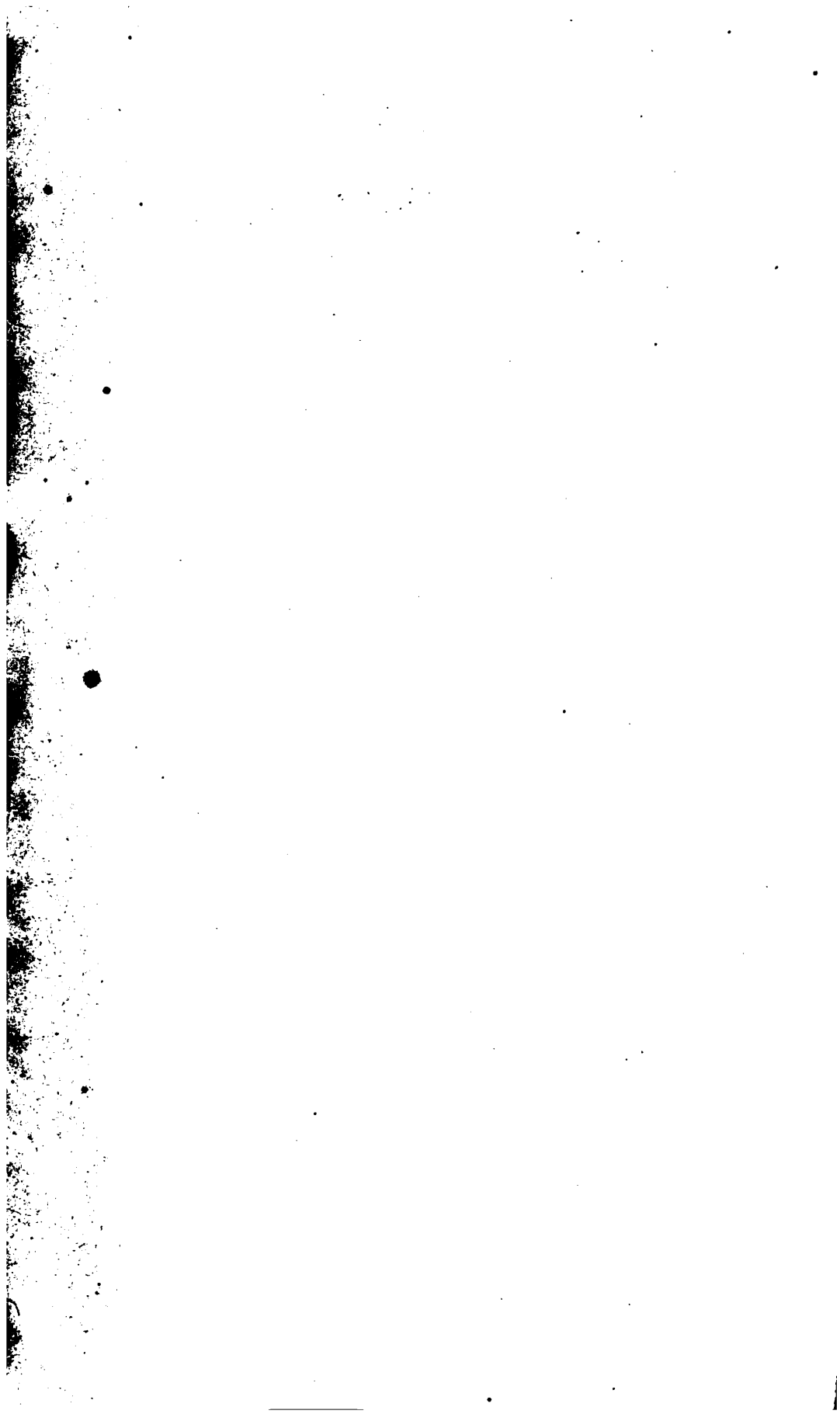




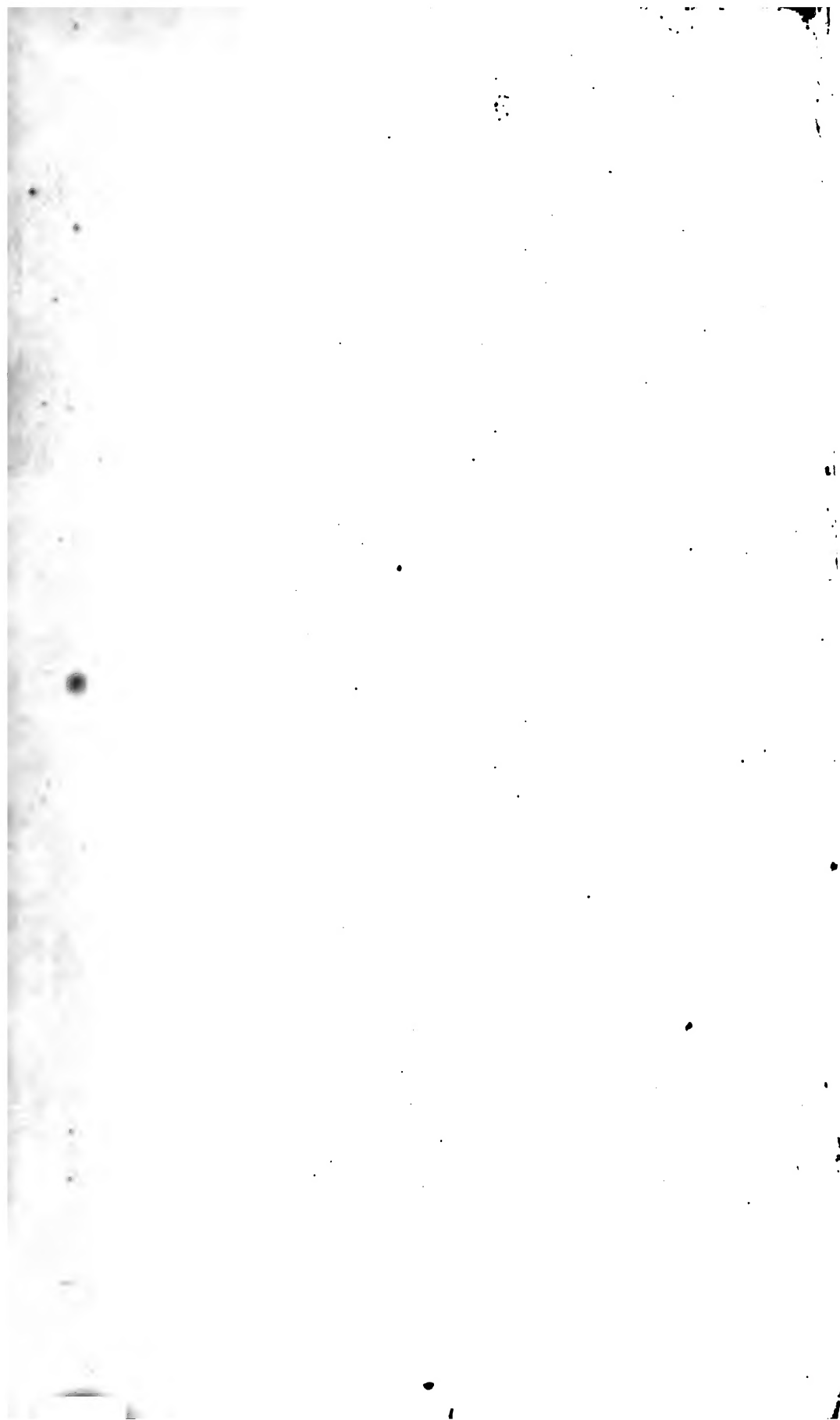












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